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Embedded Networks
Independent Pricing and Regulatory Tribunal
PO Box K35 Haymarket Post Shop,
Sydney NSW 1240

Re Submissions to Embedded Networks Draft Report December 2023

Prepared by:

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Introduction

OCN welcomes the opportunity to provide input into the embedded networks draft report and commends IPART for very detailed work in developing that report.

The Owners Corporation Network of Australia Limited (OCN) is the independent peak consumer body representing residential strata and community title owners and residents. As such, OCN is uniquely positioned to understand the needs and constraints within this unique housing sector, as well as to advise on the potential impacts that legislation may have on planning, development, and day-to-day operational outcomes. OCN are experts in residential strata, hence our comments relate to what our members are seeking. On behalf of our members, we have been engaged in embedded networks for over 4 years and have run two webinars on the subject.

OCN strives to create a better future for residential and community living and ownership. We support the transition to resilient, empowered communities living in climate ready, defect-free buildings. We are active in a range of sustainability related issues, including electrification of apartment buildings, solar and electric vehicle charging and make comment on approaches and how embedded networks could be used in a supportive way.

We fully support the submission by Professor Sherry from Macquarie University as an expert in the many legal issues with embedded networks. *References are made to Professor Sherry's submission, including the page number.*

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The Strata sector

Over 2.5 million people live in strata households in Australia. NSW, which has the largest sector, has just over 89,000 residential strata schemes housing 1.3 million people. It is the fastest growing type of dwelling, with over a thousand new schemes being registered each year. The national ownership profile averages 60:40 resident owners to investors.

https://cityfutures.adu.unsw.edu.au/documents/717/2022_Australasian_Strata_Insights_Report.pdf

All NSW strata buildings must have an owners corporation, which is a statutory corporation – it has unlimited liability and mandatory obligations to hold building insurance and strict obligations to carry out repairs and maintenance. Day-to-day administration generally falls to resident owners and strata committees. The role of the strata management industry is to provide administrative support under commercial “strata management agreements”.

Housing is not an optional consumer item

Professor Sherry pp2 - ...it is imperative that governments ensure that housing and the essential services that people use in their housing, (energy, water, sewerage etc) are only offered on a fair and equitable basis.

Level playing field

OCN advocates for a ‘level playing field’ with respect to housing. With standalone housing there is never any notion that a builder would supply and sell the home to prospective buyers under the condition that those prospective buyers do not own any of the energy infrastructure and have to pay it off to a third party by way of a long-term contract. This would never be acceptable – so why should a home which is part of an apartment building or townhouse complex be any different?

Similarly, when it comes to energy upgrade costs – like electrification, solar and electric vehicle charging, why should an apartment owner or tenant be penalised for additional building infrastructure costs or not offered the same incentives as stand-alone home owners, when in many instances the only viable form of housing is that within an apartment building?

Professor Sherry pp7: - Developers cannot do this (ie transfer costs to perspective owners) in non-strata housing because of the century’s old, rational prohibition on positive obligations (i.e., to pay money) on freehold land (see paper attached). It is not legally permissible for a developer to sell an ordinary house and make the purchaser and successive owners pay a third party, such as a solar or air conditioning company, for infrastructure or services. The only reason it is legally possible in strata title is because of the existence of a separate body corporate that can be bound by contracts, which successive apartment owners have to pay, and because of the levying provisions in strata legislation. However, the body corporate and levying provisions were not created for this reason. They were created so that private citizens could manage their collectively owned buildings. Use of these legal forms to bind owners to long term contracts that benefit third party service providers is an abuse of the strata title legal form.

Apartment living is significantly lagging in the new and important areas of increasing energy efficiency, mainly because of poor understanding of approaches to and often very high costs of the necessary additional building infrastructure to provide these important new services.

Government should investigate ways to improve the fairness and equity for all homes, irrespective of if they are standalone or contained in an apartment building.

Options include:

- funding assistance for education on the range of approaches to increase energy efficiency in apartment buildings and implementation costs for said approaches.
- legislating for a new type of embedded network operator, local energy service (see following) provider to work with owners corporations to provide advice, project management and capital funding.

Embedded Networks

There are two distinct types of embedded networks; developer initiated and owners corporation initiated.

OCN believes there needs to be clear distinction between developer (third party) originated embedded networks (which should be legislated against) and owners corporation instigated embedded networks.

Professor Sherry pp4. Embedded networks: third party operators v owners corporations

Much of the existing regulation of embedded networks, such as AER exemptions, seems to be based on an assumption that embedded networks are being operated by owners corporations. Some no doubt are, although these do not seem to have figured prominently in submissions to any government reviews. The only embedded networks that seem to be the subject of consumer complaint, and thus the driver for much government investigation, are embedded networks run by third parties. This may be because there are many more third party operator networks or because they are the only networks with unfair terms. Whatever the reason, it is clear that government regulation needs to be able to distinguish between embedded networks genuinely run by the owners of the building (the owners corporation), who along with their tenants, pay the bills, and embedded networks run by third party companies.....

Developer Initiated

OCN does not support developer initiated embedded networks where developers are simply transferring building infrastructure costs, which are reasonably expected to be included as part of the building fabric, to unsuspecting future owners and tenants, and creating unfavorable third-party contracts to bind purchasers to excessive ongoing payments for those normally included services.

Professor Sherry's expert legal opinion that developers have no right to do this pp3:

3. Strata title apartment buildings belong to their collective owners

.....In the context of embedded networks, the capacity to make savings from a discount on the bulk purchase of energy comes from the existence of a collective group of owners and tenants. As a result, that discount belongs to the owners and tenants. It does not belong to the developer, who does not have a right to effectively sell that discount to a third-party embedded network operator. Nor does the developer

have the right to sell the infrastructure to a third-party operator or create contractual rights over that infrastructure in favour of a third-party operator. Apartment owners pay for infrastructure when they purchase their apartments, along with their proportionate share of common property. To the extent that developers are effectively able to sell the discount and rights to infrastructure through contracts that bind owners corporations, this is an abuse of the strata title legal form. Owners corporations do not exist for developers to make additional money on developments, and they do not exist so that third party operators can benefit from long term contracts.

In her detailed responses to parts of the IPART Draft report, Professor Sherry makes comment on a number of points as to why developer initiated embedded networks should not be supported, which are outlined below:

- *pp 4 By insisting that ‘customers should pay a share of the cost of the embedded network operator’s investment in the infrastructure’ operators are in effect suggesting that apartment owners should pay for the infrastructure twice – once to the developer pursuant to their sales contracts, and then again to the operator pursuant to a developer-negotiated contract between the operator and the body corporate.*
- *Pp5 When it comes to the ongoing costs of maintaining that infrastructure, the owners corporation has a statutory obligation to do so under the Strata Schemes Management Act 2015 (NSW), s 106. That statutory obligation and liability exists irrespective of anybody corporate contracts in relation to infrastructure. Of course, the body corporate could engage a third-party provider to do the necessary work for the owners corporation to comply with its statutory obligations, but that engagement should be negotiated by the owners corporation independently of the developer.*
- *Pp6 Contracts are invariably negotiated primarily in the interests of the parties who negotiated them, that is the developer and the embedded network operator. Contracts like this have caused considerable dispute in strata and community schemes in Australia over the past three decades, and globally, in the past half century.*

Owners Corporation Initiated

OCN Supports the need for owners corporations to be free to enter into agreements with operators for the upgrade, management and/or funding of energy efficiency and other energy upgrades.

Professor Sherry pp5: Instead of the current developer-installed model of embedded network operators, it would be preferable if Australia developed an industry that provides services directly to bodies corporate to manage body corporate owned energy infrastructure on a fee for service basis.

We note damage to the name ‘embedded networks’. In the Consumer Federation of Australia input into a similar submission in Victoria and subsequent expert panel report, <https://engage.vic.gov.au/embedded-networks-review>, where they recommend that embedded networks in this instance should be referred to as ‘**local energy service**’ (LES) to distinguish between the two. It is also worth noting that LES would include conditions around renewable energy, and that the benefits of such are passed on to owners and tenants.

Local energy services should be investigated as a new business model to assist in the electrification of existing, gas operated apartment buildings. In this instance, these new operators should be

legislated to ensure that only the cost of these new services are borne or passed on to the respective owners corporations.

One useful example might be distributed energy resources (DER) where solar energy and storage are provided behind the meter and provided in such a way that expensive building energy supply upgrades are either replaced or reduced. This would also reduce the overall network load.

Report Response

In some instances in the report, I think due to the complexity of these issues, it is not clear if the report is or is not supporting the status quo of developers transferring infrastructure costs to unsuspecting owners and tenants. The OCN position – and the legal position as per Professor Sherry's submission - with reference to developer initiated embedded networks is as stated above.

Accordingly, rather than provide specific responses, we will provide high level position statements, as follows:

Pricing Objectives

- We support the methodologies which will result in a level playing field for apartment and stand alone home owners.
- We support the methodologies which allow a future where embedded network operators, preferably then referred to as local energy service providers, work within a model that helps fund and support energy efficiency improvements.
- We do not support methodologies where developers are allowed to either double charge for or transfer normally accepted development and infrastructure costs onto unsuspecting home owners and tenants.

Pricing approach

- We support contracts which are negotiated between an embedded network operator and an owners corporation for the supply of a range of services. Such a contract having taking into account the needs of and benefits to both parties.
- We do not support developer-initiated contracts as experience has shown they tend to be one sided toward the developer and embedded network operator, to the detriment of owners and tenants.