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EMPOWERING STRATA FOR SUSTAINABILITY:

Comparing New South Wales and Western Australia Legal Frameworks

By Tristan Cockman

INTRODUCTION

AS THE DEMAND FOR LOCAL ENERGY GENERATION GROWS, STRATA SCHEMES ARE BECOMING NEW PLAYERS IN ENABLING SUSTAINABILITY INFRASTRUCTURE. LEGAL FRAMEWORKS MUST BALANCE EFFICIENT DECISION-MAKING, CLARITY OF LAND TENURE AND THE PRACTICAL REALITIES OF SHARED PROPERTY.

Both New South Wales (NSW) and Western Australia (WA) have introduced significant legislative changes to reduce barriers for the installation of solar panels, electric vehicle chargers, rainwater tanks and similar infrastructure within strata schemes. While their approaches are similar in some respects, they diverge in ways that meaningfully affect implementation. To date, no other Australian jurisdiction has enacted comparable reforms.

This eBook examines recent and proposed reforms in both jurisdictions, highlighting key similarities, critical differences and the implications of land tenure arrangements and resolution thresholds.

NEW SOUTH WALES' SECTION 139B: AESTHETIC OBJECTIONS NO LONGER ENOUGH

New South Wales has recently prohibited by-laws from unreasonably restricting sustainability infrastructure based solely on aesthetics.[1] This addresses a persistent challenge where progressive lot owners or owners corporations pursuing solar or electric vehicle charging solutions have been blocked due to subjective aesthetic concerns.

This reform signifies the NSW Government's recognition that minor visual disruptions cannot outweigh the broader public interest in emissions reduction and sustainable urban development.

2021 REFORM TO NEW SOUTH WALES RESOLUTION REQUIREMENTS: INSPIRED BY WESTERN AUSTRALIA

In 2021, NSW amended its legislation to reduce the voting threshold required to approve sustainability infrastructure decisions. Traditionally, a special resolution required no more than 25% of votes cast against a proposal. The reform introduced a key carve-out: if a motion relates to sustainability infrastructure, it is deemed to have passed as a special resolution if less than 50% of the votes cast are against it.[2]

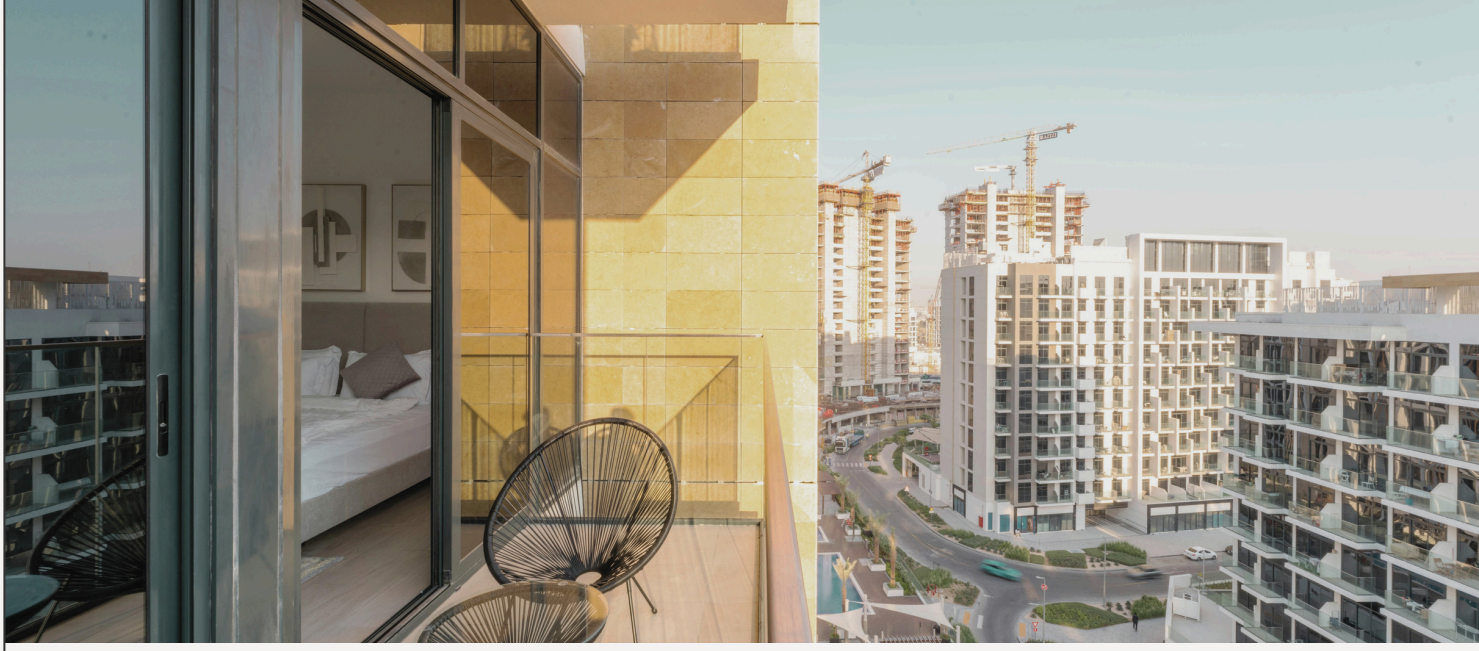
These changes were, at least in part, inspired by WA's earlier reforms. Notably, the WA reforms were influenced by submissions I made to the WA Government in 2018 advocating for change. The NSW amendments effectively recalibrate decision-making power, empowering progressive strata communities to act without being stymied by a resistant minority.

WESTERN AUSTRALIA'S 2018 REFORMS: ORDINARY RESOLUTION FOR SUSTAINABILITY INFRASTRUCTURE

WA led the way with 2018 reforms, that allowed strata companies (the equivalent to owners corporations in NSW) to approve sustainability infrastructure works by ordinary resolution – defined as a majority of votes cast (50% or more).[3] This created a lower threshold than that typically required for improvements to common property and provided a clear legal pathway for schemes and lot owners seeking to implement sustainability measures.

The NSW's amendment to the definition of special resolution mirrors this in effect. Both jurisdictions allow a simple majority of votes cast to carry a sustainability resolution, removing the higher bar that applies to other capital upgrades.

[1] *Strata Schemes Management Act 2015* (NSW) s 139B.
[2] *Ibid ss 5*, 132B.
[3] *Strata Titles Act 1985* (WA) s 102(f).



COMPARING DEFINITIONS: FLEXIBILITY VS SPECIFICITY

Each state has adopted its own statutory definition of sustainability infrastructure. WA opts for a generalised approach, defining sustainability infrastructure broadly and supplementing it with examples such as solar panels, clothes lines and rainwater tanks.[4] This allows the courts to interpret the provision flexibly as technologies and standards evolve.

NSW takes a more prescriptive approach, explicitly listing sustainability infrastructure to be measures that:[5]

- reduce energy or water consumption;
- prevent pollution;
- reduce waste or emissions;
- facilitate sustainable transport (e.g., EV chargers); or
- increase recycling.

While NSW's exclusion of a general catch-all or residual clause provides stakeholders greater certainty, it may inadvertently limit flexibility as sustainability technologies develop or where infrastructure has multiple purposes.

LAND TENURE AND THIRD-PARTY ACCESS: THE KEY DIVERGENCE

The most significant difference between NSW and WA lies in how each jurisdiction addresses land tenure for sustainability infrastructure – particularly where it is not owned and operated directly by the owners corporation.

Sustainability arrangements may involve third-party providers or individual lot owners installing equipment (e.g., solar panels) on common property. For example:

- a third-party solar provider may propose installing panels and batteries under a power purchase agreement; and
- a lot owner may wish to install their own solar panels or EV charger on common property.

In both scenarios, the scheme must usually grant a lease or licence over common property.

[4] Ibid s 3(1).
[5] *Strata Schemes Management Act 2015* (NSW) s 132B(2).

In NSW, granting a lease over common property requires a special resolution.[6] While the definition of special resolution has been modified in relation to sustainability infrastructure, it is unclear whether this reduced threshold extends to granting leases or licences.

Notably, the definition of "sustainability infrastructure resolution"[7] does not specifically include resolutions granting leases or licences. The practical result is that proposals involving ownership or operation by third parties or lot owners may still require a higher resolution threshold (i.e., less than 25% against), even where the infrastructure itself only needs a simple majority.

This creates a two-tiered system: one for owners corporation-owned infrastructure, which benefits from the reduced threshold and another for third-party or lot owner-owned systems, which may not.

In contrast, WA provides a much cleaner solution with the introduction of a new concept: the infrastructure contract.[8] It allows land tenure (such as exclusive use or control of space on common property) to be granted to a third party or lot owner by ordinary resolution – the same reduced threshold as for installing the infrastructure.[9]

Moreover, an infrastructure contract is deemed to be an easement, meaning it automatically runs with the land and no separate title registration is required. This avoids the cost and administrative burden of registering leases or easements through Landgate – a critical benefit, especially for small-scale or residential systems where such costs would outweigh expected savings.

While this deeming provision has attracted some criticism, particularly around the impact on the principle of indefeasibility, it is seen as a pragmatic and necessary step to overcome practical and financial hurdles, especially for strata companies and lot owners adopting sustainability measures.

CONCLUSION: CONVERGING GOALS, DIVERGING MECHANICS

Both NSW and WA have made significant strides to remove the governance barriers to sustainability infrastructure in strata schemes. Each jurisdiction permits approval by simple majority of votes case, recognising the importance of preventing minorities from vetoing sustainability investments.

However, their mechanisms differ in ways that affect practical outcomes. NSW offers a tightly defined scope for eligible works and reforms resolution thresholds only where the owners corporation retains ownership. WA champions a more flexible definitional approach and pairs its voting reforms with a novel legal structure – the infrastructure contract – to solve the issue of land tenure in shared property.

As strata schemes increasingly become hubs for decentralised energy and sustainable living, the lessons from these reforms will be critical for other jurisdictions and for future refinements to existing laws. WA's approach on third-party access and tenure may provide a blueprint for NSW and other jurisdictions as uptake of EV charging and embedded solar accelerates. Conversely, NSW's move to prohibit by-laws that unreasonably restrict sustainability infrastructure sets an important precedent that WA and other jurisdictions may wish to consider.

[6] *Strata Schemes Development Act 2015* (NSW) s 33.
[7] *Strata Schemes Management Act 2015* (NSW) s 132B(2).
[8] *Strata Titles Act 1985* (WA) s 64.
[9] Ibid.

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