Who Owns the Embedded Network Infrastructure when it is Attached to the Common Property?

A “fixture” refers to objects that are attached to the land in such a manner that they become part of the land. Once an object becomes a part of the property, it belongs to the property owner. But how does the concept of fixture and ownership play out in context of strata scheme buildings? As a fixture, does an item form part of the common property and vest in the owners corporation, or is the ownership still vested in the party who installed the structure?

This question is pertinent to situation where an embedded electricity network is installed in a building during the construction phase for infrastructure required for delivery of various utilities and service to a site with multiple homes, such as apartment blocks, retirement villages or caravan parks. In simple terms, it is a private network through an embedded network service provider to acquire utilities supplied.

The most common scenarios we see are:

- The owners corporation is the owner of the embedded network infrastructure and is the embedded network service provider, the embedded network customers being the lot owners and tenants in the scheme. In this case, the owners corporation usually engages a specialist energy company to provide assistance; or

- The embedded network infrastructure installed by a specialist company prior to registration of the strata scheme, which acts as embedded network service provider, the embedded network customers being the owners corporation in relation to common property consumption and lot owners and tenants in relation to lot consumption.

This article focuses on the latter situation where the embedded network infrastructure is leased to the owners corporation by a network supplier which allows the supplier to remove upon termination of lease. In light of the concept of fixture in mind, who actually owns the embedded network infrastructure once that is affixed to the common property – the supplier who provides the infrastructure, or the owners corporation who is the legal owner of the common property?

In *Standard Portland Cement Company Pty Ltd and Another v Good (1983) 57 ALJR 151* where the transaction was structured with the intention of separating the ownership of the cement mill fixed to land from ownership of the land itself. It was held that the cement mill fixed to the land was excluded from the contract of sale and therefore the ownership of the mill was never passed to the purchaser following the sale. Accordingly, the former proprietor Standard Portland Cement had been the owner of the cement mill the entire time and was able to recover the mill even after the

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contracted period stipulated in the transaction. The principle from this case indicates that the ownership (i.e. legal interest) in a fixture can be vested in a person who is not the owner of the land.

Similarly, a recent decision in *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 395* has confirmed that the plant and equipment installed on leased land for the purposes of a wind farm are tenant's fixtures and the tenant had the right to sever and remove them during and at the end of the lease. The doctrine derived from this case is that, if a chattel has become a fixture (because it has been affixed or annexed to land with the objectively ascertained intention that it become part of the land, having regard to the degree and object of annexation), the question then is whether the fixture is a tenants' fixture. By being a fixture, the item has become part of the landlord's property and the landlord has legal title to it. However, if the item is a tenants' fixture, the landlord's title is subject to a right of the tenant to sever and remove the item during or at the expiration of the lease term.

Having said that, the Supreme Court of NSW has posed a different view of fixture on common property in *Houghton v Immer (No. 155) Pty Limited [1997] 44 NSWLR 46* where an owner constructed penthouses on common property pursuant to consent obtained from the owners corporation. It was held that the "title to the permanent improvements accrued automatically to the owners of the common property". In other words, the ownership of the penthouses constructed on the common property will belong to the owners corporation and this "could not be prevented by any declaration of a contrary".

But after considering the case law, even more important consideration is to be given to section 24 of the Strata Schemes Development Act 2021 which provides:

24 Effect of creation of common property by registration of plans or notices

1) This section applies if common property in a strata scheme is created by registration of a strata plan, strata plan of subdivision or notice of conversion.

2) On registration of the plan or notice, the common property—

(a) vests in the owners corporation of the strata scheme, and

(b) is freed and discharged from any mortgage, charge, covenant charge, writ or caveat affecting the land, and

(c) if the common property is land in a freehold strata scheme—is freed and discharged from any lease affecting the land immediately before registration of the plan or notice, <u>other than a lease that is necessary for the purpose of providing a service to the scheme</u>.

To conclude, there is no definitive authority on whether all fixtures necessarily constitute common property and hence vested in the owners corporation on registration of the strata plan. All infrastructure within or attached to the common property must be assessed on a case by case basis, and the legal principles of intention and purpose of annexation must be taken into account and

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importantly, consideration as to whether a lease over the infrastructure existed at the time of registration of the plan.

Key takeaways

- The ownership of embedded network infrastructure can be complex, involving both the owners corporation and the original supplier.
- Legal precedents indicate that fixtures can remain the property of the installer, even when affixed to common property.
- The distinction between tenant's fixtures and landlord's property is crucial in determining ownership rights.
- Recent court decisions highlight the importance of intention and annexation in fixture ownership.
- Understanding these legal principles is essential for strata scheme participants regarding utility service agreements.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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