

## LESSONS IN PERSONAL FREEDOM AND FUNCTIONAL LAND MARKETS: WHAT STRATA AND COMMUNITY TITLE CAN LEARN FROM TRADITIONAL DOCTRINES OF PROPERTY

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*I am not young enough to know everything.*<sup>1</sup>

### I INTRODUCTION

Strata and community title<sup>2</sup> are the fastest growing forms of property title in Australia. For decades, successive New South Wales governments have had policies of urban consolidation, with previous targets aiming to fit 70 per cent of Sydney's new development within Sydney's existing footprint.<sup>3</sup> Medium or high density strata title was the only way to achieve this end. While the most recent *Draft Metropolitan Strategy* flags new land releases on Sydney's urban fringe, much development will still occur within existing urban areas and will be strata title.<sup>4</sup> Further, with both local and state government policy favouring new development that minimises costs to the public purse, new 'greenfields'

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1 Ernest Woolley in J M Barrie, *The Admirable Crichton* (1902) Neverpedia <[http://neverpedia.com/pan/Read:The\\_Admirable\\_Crichton](http://neverpedia.com/pan/Read:The_Admirable_Crichton)>.

2 Strata and community title are the subdivision of land into individually owned lots (eg, apartments, houses, vacant land, commercial space, tourist accommodation) and common property (eg, stairs, lifts, pools, carparks, sporting facilities, roads, parks). In NSW, they are created by the *Strata Schemes (Freehold Development) Act 1973* (NSW) ('*SSFDA*'), the *Strata Schemes (Leasehold Development) Act 1986* (NSW) ('*SSLDA*'), and the *Community Land Development Act 1989* (NSW) ('*CLDA*'). They are managed by the *Strata Schemes Management Act 1996* (NSW) ('*SSMA*') and the *Community Land Management Act 1989* (NSW) ('*CLMA*'). See Cathy Sherry, 'The Legal Fundamentals of High Rise Buildings and Master Planned Estates: Ownership, Governance and Living in Multi-owned Housing with a Case Study on Children's Play' (2008) 16 *Australian Property Law Journal* 1.

3 Department of Planning and Infrastructure (NSW), 'Metropolitan Plan for Sydney 2036' (2010) 12 <[http://www.gcc.nsw.gov.au/media/Pdf/MetroPlan2036\\_Overview%20Document.pdf](http://www.gcc.nsw.gov.au/media/Pdf/MetroPlan2036_Overview%20Document.pdf)>.

4 Department of Planning and Infrastructure (NSW), *Draft Metropolitan Strategy for Sydney 2031* (2013) 13 <[http://strategies.planning.nsw.gov.au/Portals/0/Documents/3\\_Draft\\_Metro\\_Balanced\\_Growth.pdf](http://strategies.planning.nsw.gov.au/Portals/0/Documents/3_Draft_Metro_Balanced_Growth.pdf)>.

development is likely to be community title.<sup>5</sup> Community title allows roads, parks, sporting facilities, boardwalks, marinas, wetlands, sewerage and water services to be vested in a private body corporate,<sup>6</sup> shifting not just the initial infrastructure costs to private owners, but their maintenance costs in perpetuity. When people buy a home in a 'resort style' master planned development and subsequently become frustrated by ever-rising levies, this is invariably because they have not understood that the marina, tennis court, clubhouse and 'wellbeing centre' – the visually 'public' spaces in the development – are as much their private property as their pergola and back courtyard; they just happen to co-own them with 300 other residents.<sup>7</sup> Common property is not public property, but collectively owned private property.

As collectively owned private property, common property is privately regulated. All strata and community schemes have by-laws or management statements,<sup>8</sup> which regulate the use of common property by residents. By-laws can be the model form provided by the legislation,<sup>9</sup> or tailor-made by the developer's lawyer. In community title, by-laws can also create a 'theme' for the development, for example a resort or eco-theme.<sup>10</sup> By-laws can be altered by the community, and with the exception of banning children, guide dogs, leasing or transfer,<sup>11</sup> or writing by-laws based on 'race or creed, or on ethnic or socio-economic grouping',<sup>12</sup> there is little limit on the content of by-laws.<sup>13</sup> In New South Wales, the power to write by-laws extends beyond common property to lot property, that is, people's homes. So long as a by-law relates to the 'control, management, administration, use or enjoyment of the lots or the lots and common property', it will be valid.<sup>14</sup>

By now it should be obvious that strata and community title sit squarely at the crossroads of private and public institutions and regulation. Favoured by

5 For readers unfamiliar with community title, developers' websites are the best way to appreciate its form and function. See, eg, Breakfast Point in Sydney's Inner West <<http://www.breakfastpoint.com/index.php>>; The New Rouse Hill and its privately owned town centre in North West Sydney <<http://www.thenewrousehill.com.au>>, <<http://www.rhtc.com.au>>; Sanctuary Cove in South East Qld <<http://www.sanctuarycove.com>>.

6 The terminology in the NSW Acts can be confusing. The term 'body corporate' was initially used for the separate legal entity made up of all lot owners in a scheme. The *SSFDA* still uses this term, however the *SSMA* uses the term 'owners corporation'. The *CLDA* and *CLMA* use the term 'community association' and tiered schemes might also have 'precinct' and/or 'neighbourhood' associations. All of these entities are simply bodies corporate made up of all lot owners in the scheme in question. For ease of comprehension, this article will use the generic term 'body corporate'.

7 Legal title to common property vests in the body corporate but is owned beneficially by all lot owners as tenants in common in proportion to their unit entitlement: *SSFDA* ss 18, 20; *CLDA* ss 31, 32.

8 Community title uses the term 'management statements', but they are effectively the same as strata by-laws: *CLDA* sch 3. For ease of comprehension, this article will use the generic term 'by-laws'.

9 There are no model by-laws for community title but the latest form of model strata by-laws is in sch 1 of the *SSMA*.

10 *CLMA* s 17.

11 *SSMA* s 49.

12 *CLDA* sch 3 cl 5.

13 Strata by-laws cannot be inconsistent with the *SSMA* or any other act: *SSMA* s 43(4).

14 *SSMA* s 47. See also *CLDA* sch 3; *CLMA* s 14.

government policy, millions of Australians will have no choice but to live and work in strata and community title in the future. Many schemes will not be the 12 lot walk-ups, which make up older strata stock; they will be 100 to 500 lot schemes, and in the case of community title, entire suburbs.<sup>15</sup> On the acquisition of private property, purchasers will automatically become a member of what is in effect a small local government, owning and managing significant physical assets, many of which would otherwise be public. As a member of this mini-government, purchasers will have the power to write almost unlimited laws regulating their neighbours' lives and homes, and be regulated in their turn.<sup>16</sup>

While there are many ways this blurring of private and public functions and law could be analysed,<sup>17</sup> this article will use private property law. The capacity of private law, in particular land law, to safeguard public values is often overlooked. Property law is presumed to be the preserve of dull, archaic technicality or crass commercialism; the subject that junior members of faculty are press-ganged into teaching and students habitually dread. In reality, that dull technicality created and continues to preserve basic values of modern democratic society. This becomes obvious when we stray from traditional land rules to create novel forms of ownership like strata and community title.

The article is divided into five parts, and by way of warning to the reader, has an ambitious ambit. Property law is one of the oldest areas of law and remains firmly connected to its historic roots. When discussing big concepts in land law,

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15 The New Rouse Hill in Sydney's North West growth sector will have 4500 residents on completion. The development is community title and the Rouse Hill Town Centre is owned by the GPT Group: Lend Lease GPT, *Key Facts*, The New Rouse Hill <[http://www.thenewrousehill.com.au/Content.aspx?urlkey=rh\\_fastfacts](http://www.thenewrousehill.com.au/Content.aspx?urlkey=rh_fastfacts)>; GPT Group, *Centre Info*, Rouse Hill Town Centre <<http://www.rhtc.com.au>>.

16 Tenants impliedly covenant to comply with by-laws: *SSMA* s 44(2); *CLMA* s 18. However they have no power to create by-laws as they are not members of bodies corporate.

17 There is vast and fascinating literature from the United States which focuses directly on the public nature of homeowner associations, the United States equivalent of bodies corporate: Robert C Ellickson, 'Cities and Homeowners Associations' (1982) 130 *University of Pennsylvania Law Review* 1519; Gerald E Frug, 'Cities and Homeowners Associations: A Reply' (1982) 130 *University of Pennsylvania Law Review* 1589; Gregory S Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Community' (1989) 75 *Cornell Law Review* 1; Gregory S Alexander, 'The Publicness of Private Land Use Controls' (1999) 3 *Edinburgh Law Review* 176; Paula A Franzese, 'Common Interest Communities: Standards of Review and Review of Standards' (2000) 3 *Washington University Journal of Law & Policy* 663; David J Kennedy, 'Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers' (1995) 105 *Yale Law Journal* 761; Clayton P Gillette, 'Courts, Covenants, and Communities' (1994) 61 *University of Chicago Law Review* 1375; Steven Siegel, 'The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after *Marsh v Alabama*' (1998) 6 *William & Mary Bill of Rights Journal* 461; Susan F French, 'Constitution of a Private Residential Government Should Include a Bill of Rights' (1992) 27 *Wake Forest Law Review* 345; David T Beito, Peter Gordon and Alexander Tabarrok (eds), *The Voluntary City: Choice, Community, and Civil Society* (University of Michigan Press, 2002); Robert H Nelson, *Private Neighbourhoods and the Transformation of Local Government* (Urban Institute Press, 2005); Georg Glasze, Chris Webster and Klaus Frantz (eds), *Private Cities: Global and Local Perspectives* (Routledge, 2006); Setha Low, *Behind the Gates: Life, Security, and the Pursuit of Happiness in Fortress America* (Routledge, 2003); Edward J Blackely and Mary Gail Snyder, *Fortress America: Gated Communities in the United States* (Brookings Institution Press, 1999).

like the public values it embodies, it is inevitable that we will sweep across centuries and across continents. Further, the article does not examine a single issue in strata and community title – it goes right to its very core.

We start in Part II by examining the morality of private property and its consequent embodiment of public values. This section describes the way multiple private property entitlements combine to construct social and political regimes. Part III then examines specific entitlements property doctrines and statutes have allowed, and more importantly disallowed over centuries, and the public values that those rules helped to create. Specifically, it shows that by eliminating restrictions and obligations attached to land, property law played a central role in dismantling the feudal pyramid, and creating a liberal democratic society and free land market. Part IV considers the anomaly of the freehold covenant; a seemingly minor doctrine that ran counter to the dominant, simplifying trajectory of modern property law. Part V describes the ramifications of this anomaly, namely that the freehold covenant became the theoretical basis for strata and community title. As noted above, far from being an inconsequential area of property law, strata and community title are the fastest growing forms of title in Australia. Finally, Part VI looks at the kind of communities that have developed as a result of this anomalous vein of property law and the economic and social concerns that they raise.

## II PRIVATE LAW, PUBLIC VALUES

My starting point is an insistence that property matters deeply. It behoves us to remember that the catchcry of the English middle classes during the Glorious Revolution was life, liberty *and property*.<sup>18</sup> Land is essential to human survival; ‘without some minimal appropriation – without some minimal taking of the resources necessary to sustain life – we will die.’<sup>19</sup> As embodied beings, without property, life and freedom have little value. As Jeremy Waldron says, ‘[e]verything that is done has to be done somewhere’, thus, ‘[n]o one is free to perform an action unless there is somewhere he is free to perform it.’<sup>20</sup>

While it is easy to lose sight of these truisms in a politically stable, affluent democratic state, they remain fundamentally important to how and why we value our land. The property we own, our homes and our businesses, are our means of survival. They are the places that we are free to be ourselves, to live out the life we choose to lead. As Joseph Singer says:

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18 John Locke, ‘Second Treatise of Government’ in Thomas Hobbes and John Locke, *On Sovereignty* (Collector’s Library of Essential Thinkers, 2005); Douglass C North and Barry R Weingast, ‘Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England’ (1989) 49 *Journal of Economic History* 803.

19 Laura S Underkuffler-Freund, ‘Property: A Special Right’ (1996) 71 *Notre Dame Law Review* 1033, 1039–40.

20 Jeremy Waldron, ‘Homelessness and the Issue of Freedom’ (1991) 39 *UCLA Law Review* 295, 296. See also Edward W Soja, *Seeking Spatial Justice* (University of Minnesota Press, 2010).

Property concerns things needed for human life. At the most elemental level, property gives us a place to be: a place to work. It gives us the means to thrive: food to eat, clothing to wear. It gives us things that make life enjoyable, meaningful, and fun. But property does not only provide our material needs. It enables us to exercise autonomy, to enjoy our liberties, to shape our destiny, to form relationships with others, to live a human life. We cannot live our lives without the means to do so.<sup>21</sup>

Although our physical need for land is straightforward, our rights to it are not. Property scholarship reminds us that there is no ‘inevitable content’ to property,<sup>22</sup> and that includes strata and community title. Property is a contested concept, and we need to argue for what is in and what is out of protected property rights. Dagan reasonably asserts that the test is whether rights amount to ‘justificatory practice’, determined by reference to social values.<sup>23</sup> Singer says, ‘[p]roperty is not just something we protect or invade, recognize or reject; it is something we collectively construct. We must give it its meaning, both social and legal’, and most importantly, the ‘mix of entitlements and obligations we can legitimately claim depends on the kinds of human relationships we can defend, nothing more and nothing less’.<sup>24</sup> Singer argues that any attempts to avoid considered judgements about morality and justice when theorising about property are futile as there is ‘no baseline free from judgment about the fair minimum standards for human relations’.<sup>25</sup>

Merrill and Smith argue that despite various attempts in our intellectual tradition to separate property and morality, they are inevitably linked. They assert that no system of property can survive without a connection to basic morality, otherwise it could never secure the widespread acceptance of its terms by large numbers of unconnected people which is necessary for it to be a right in rem, or ‘good against the world’.<sup>26</sup> Ultimately, like human or civil rights, what constitutes property is what is widely believed to be morally justifiable. In describing what she calls the ‘second-best morality’ of property (the compromise position of most property rights), Rose memorably said that property’s inevitable morality ‘does not presume saintliness, but it also is not made for total sinners; she is neither the girl next door nor the woman in red.’<sup>27</sup> In ‘A Statement of Progressive Property’, Professors Alexander, Penalver, Singer and Underkuffler state that ‘[c]hoices about property entitlements are unavoidable, and, despite the incommensurability of values, rational choice remains possible through reasoned

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21 Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000) 27.

22 Hanoch Dagan, ‘The Limited Autonomy of Private Law’ (2008) 56 *American Journal of Comparative Law* 809, 814.

23 *Ibid* 814–15.

24 Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 215–16.

25 *Ibid* 215; Joseph William Singer, ‘Normative Methods for Lawyers’ (2009) 56 *UCLA Law Review* 899, 904.

26 Thomas W Merrill and Henry E Smith, ‘The Morality of Property’ (2007) 48 *William and Mary Law Review* 1849.

27 Carol M Rose, ‘The Moral Subject of Property’ (2007) 48 *William and Mary Law Review* 1897, 1900.

deliberation', with reference to context, experience and principle.<sup>28</sup> Importantly, they state that property should not only promote communitarian values like civic responsibility or just distribution of resources, but traditional liberal values of individual freedom and autonomy, to acquire wealth and personal security, and to 'live one's life on one's own terms.'<sup>29</sup>

When determining the content of property or 'justificatory practice', it is essential to remember that property, like all law, operates on a micro and macro level. On a micro level, law has never favoured individual exploitation or abuse. Contract law, for example, is the legal embodiment of the moral norm that if you solemnly promise to do something for someone else and they have given you something in return, you should carry out that promise. The law rewards acceptable human behaviour and penalises that which is unacceptable. Ideally, property institutions 'both construct and reflect the ideal ways in which people interact in a given category of social contexts (eg, market, community, family) and with respect to a given category of resources (eg, land, copyright, patents).'<sup>30</sup> Integral to this argument is an acknowledgement that by creating rights in some, property imposes externalities on others and property law must be, and in fact is, attentive to this.<sup>31</sup> Much of the complexity of property law, the endless exceptions and qualifications, are attempts by property law to protect non-owners from externalities that cannot be justified.<sup>32</sup>

However, law does not simply operate on a micro level of individual entitlements and corresponding individual loss. This is because micro individual entitlements multiplied thousands of times across time, and in the case of property, across a physical landscape, create an entire social and political system or regime.<sup>33</sup> As Singer argues, '[p]roperty law is part of the way we define a legitimate social order', and 'we cannot conclude that a particular set of property rules or institutions is acceptable unless we attend to the systemic effects of exercising those property rights.'<sup>34</sup>

Once we turn our minds to those systemic effects, we are forced to an election: 'the legal rules we choose may have deep and lasting effects on our social world. ... If property shapes social relations, we need to ask ourselves: "In which world would we rather live?"'<sup>35</sup>

28 Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743, 744.

29 Ibid 743.

30 Dagan, above n 22, 815.

31 Singer defines externalities as 'effects on others not directly involved in a transaction or act': Joseph William Singer, 'How Property Norms Construct the Externalities of Ownership' in Gregory S Alexander and Eduardo M Penalver (eds), *Property and Community* (Oxford University Press, 2010) 57, 61; Singer, *Entitlement*, above n 24, 30–1.

32 Singer, *Entitlement*, above n 24, 30–1; Singer, 'How Property Norms Construct the Externalities of Ownership', above n 31.

33 Singer, *Entitlement*, above n 24, 143; Singer, *The Edges of the Field*, above n 21; Dagan, above n 22.

34 Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell Law Review* 1009, 1049–50.

35 Singer, *Entitlement*, above n 24, 137–8. See also Singer, *The Edges of the Field*, above n 21, 20.

There is arguably no better illustration of the role that property law plays in creating social and political systems, and constructing public values, than the history of racially restrictive covenants in the United States.<sup>36</sup> In 1917, the Supreme Court in *Buchanan v Warley* ruled that it was unconstitutional for municipalities to racially segregate housing through zoning laws.<sup>37</sup> In response, property lawyers began to do privately what local municipalities had previously done for them. They attached restrictions to freehold land that prohibited the land being bought or occupied by anyone who was not Caucasian, effectively ensuring that African and Chinese American families could never live in subdivisions intended for white Americans. On a micro level, these covenants were simply voluntary contractual agreements between an original vendor and purchaser that the purchaser would agree to his land being permanently bound by this restriction. Each subsequent purchaser also impliedly agreed to the restriction by voluntarily buying the land. The theory underlying the law's enforcement of covenants is that rational individuals negotiate agreements that maximise the economic value of their land.<sup>38</sup> If they judge rightly, they will benefit; if they judge wrongly, they and anyone who voluntarily and knowingly takes from them,<sup>39</sup> will bear the consequences. Racially restrictive covenants were taken up enthusiastically by the United States real estate industry and even the Federal Housing Authority, which recommended that restrictions should include 'prohibition of the occupancy of properties except by the race for which they are intended.'<sup>40</sup> All of this was done ostensibly to preserve property values. By 1960, one large-scale builder could boast a community in Long Island with 82 000 residents, not one of whom was black.<sup>41</sup>

Racially restrictive covenants were finally outlawed by the Supreme Court in 1948 in *Shelley v Kraemer*,<sup>42</sup> ironically not on the grounds that the agreements themselves were invalid as a matter of property law, but rather that enforcement by courts would amount to discriminatory state action prohibited by the 14<sup>th</sup> Amendment to the *United States Constitution*.<sup>43</sup> While *Shelley v Kraemer* was a significant milestone for civil rights, irreparable damage had already been done

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36 James A Kushner, 'Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States' (1979) 22 *Howard Law Journal* 547.

37 245 US 60 (1917).

38 Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *Southern California Law Review* 1353.

39 The enforcement of covenants depends on notice. Even in the Torrens system in Australia, covenants are a strange anomaly within the ordinary registration rules. Even once recorded on the Register (in the states where that is possible), restrictive covenants remain equitable interests in land that bind subsequent purchasers by virtue of notice in accordance with *Tulk v Moxhay*: (1848) 2 Ph 774; 41 ER 1143. See Sharon Christensen and W D Duncan, 'Is It Time for a National Review of the Torrens' System? – The Eccentric Position of Private Restrictive Covenants' (2005) 12 *Australian Property Law Journal* 104.

40 Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, 1994) 65.

41 *Ibid* 70–1.

42 334 US 1 (1948).

43 The equal protection clause in the 14<sup>th</sup> Amendment to the *United States Constitution* provides that no state shall deny persons within its jurisdiction equal protection of the law.

to the lives and dignity of millions of individual African and Chinese Americans. Damage had also been done to American society and its cities; one example, in relation to education, will suffice.

The United States has struggled for decades with the problem of racially segregated schools. Despite the landmark Supreme Court decision in *Brown v Board of Education of Topeka*<sup>44</sup> prohibiting the exclusion of children from schools on the basis of race, American schools remain deeply segregated. This is hardly surprising when we consider the history of racially restrictive covenants. If children attend the school in their local area and their local area is racially segregated, so too will their school be. The result is that millions of African American and Hispanic children have attended under-resourced inner urban schools, while white children attend well-resourced suburban institutions.<sup>45</sup> Governments and courts have spent much money and time trying to combat the problem,<sup>46</sup> but a workable solution is yet to be found.<sup>47</sup>

So, what remains an endemic, destructive, social and economic problem,<sup>48</sup> can partly be traced back to a rule of private property law, utilised by developers and lawyers to increase sale prices in residential subdivisions. Land transactions that might be perceived as private voluntarily negotiated agreements, facilitated by technical rules of property law, when multiplied thousands of times through time and across a physical space, create a social and political system, as well as an urban landscape, in which we and future generations must live. As Singer says:

The legitimacy of the exercise of a property right depends on the consequences of exercising the right. Those consequences are historical events; they take place in time. Thus, the time that matters is not only the magic moments of acquisition and transfer. Rather, what matters are the continuing moments in which property rights are exercised. The tensions that are a necessary component of the institution of private property affect not only choices about initial acquisition and transfer but also the proper moral and legal response to exercises of rights as they happen over time.<sup>49</sup>

Racially restrictive covenants are an example of property law getting things wrong, but as a general rule, property law has got a lot of things right. If the

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<sup>44</sup> 347 US 483 (1954).

<sup>45</sup> The problem is exacerbated by the fact that many public schools in the United States are funded by local property taxes.

<sup>46</sup> For example, in the 1970s, court-ordered bussing programs moved white children into predominantly black schools and vice versa: Steven E Asher, 'Interdistrict Remedies for Segregated Schools' (1979) 79 *Columbia Law Review* 1168, 1170. Bussing was widely criticised, allegedly leading to 'white flight' into the private schools that mushroomed in white neighbourhoods; bussing was eventually abandoned.

<sup>47</sup> Gary Orfield and Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality* (Civil Rights Project Research Report, Harvard University, January 2005). The Civil Rights Project, originally at Harvard University, and now at the University of California, Los Angeles, has been researching racial segregation in American schools for almost two decades. There are multiple reports available at: <<http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity>>.

<sup>48</sup> See Jonathan Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* (Crown Publishing Group, 2005).

<sup>49</sup> Singer, *Entitlement*, above n 24, 174.

content of property law is determined by moral choices made with reference to their effects on individuals and society, not just today but through time, what are the big choices property law has made and what are their effects? Knowing the answers to these questions is crucial when we seek to alter property law in any significant way – for example, through strata and community title legislation. When we alter property law, we inevitably alter society, not just for ourselves, but for future generations. We do not want to fall victim to the cliché of not realising what we've got until it's gone.

### III FROM FEUDALISM TO DEMOCRACY

That the content of law is a consequence of moral choices which in turn affect and constitute society is true of all law, not just property. However land law has a particular significance, absent in more youthful areas of law such as contracts, administrative law, torts and corporate law. Principles of modern land law developed over the centuries, in which our law and political system struggled to wrestle control from the hands of absolute monarchs and vest it in democratically elected parliaments.<sup>50</sup> In this period of history, ownership of land transformed from an institution which bound an individual to multiple feudal relationships of personal obligation and dominance, into an institution which allows an individual relative but unprecedented autonomy and freedom. In short, land law played a crucial role in the development of a free land market<sup>51</sup> and democracy. Current crises in capitalism aside, both remain bedrock institutions in our community.

In feudal society, ownership of land did not mean what it means to us today. The downfall of the Roman Empire resulted in the loss of law, order, trade and a monetary economy in Western Europe. To secure protection no longer provided by law, people placed their land, their only asset of value and means of survival, in the hands of a stronger neighbour.<sup>52</sup> That neighbour in turn might place all of his land in the hands of another stronger neighbour still. Thus, ownership of land ceased to be a simple relationship to a piece of earth and became multiple relationships with other individuals to whom the owner owed, or from whom the owner could extract, obligations. With the Norman Conquest in 1066, a feudal

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50 See North and Weingast, above n 18.

51 References to a free land market are not intended as references to an unregulated market. My argument is not underpinned with the economic rationalism or libertarianism so common in the United States academic debates. By free land market, I mean the kind of basic free market that we would expect to find in all democratic societies and which is absent in undemocratic countries like China or the Middle East. See, eg, Katherine Wilhelm, 'Rethinking Property Rights in Urban China' (2004) 9 *UCLA Journal of International Law and Foreign Affairs* 227.

52 Peter Butt, *Land Law* (LBC Information Services, 3<sup>rd</sup> ed, 1996) 51.

system of land ownership was actually or theoretically<sup>53</sup> imposed on all land in England, creating a pyramid of land ownership and obligations with the king at the top. The most important obligation of land owners who held directly from the king was the provision of knights, but in the absence of an adequate monetary economy, land grants ‘paid’ for clerical duties, weapons, food, entertainment and most importantly, agricultural labour.<sup>54</sup> The overall effect of a feudal system of land ownership was *a systemic fragmentation of property rights*, that is, ownership of a single piece of land was split between multiple individuals. Butt cites an example of land that was owned at the turn of the 14<sup>th</sup> century by seven men, the ultimate lord holding of the King of Scotland, who in turn held of the King of England.<sup>55</sup> There were social and economic incentives for owners to further fragment title to pass on their obligations to someone below them.<sup>56</sup>

A fundamental part of the development of a free land market was the dismantling of the feudal pyramid and the *re-aggregation of fragmented interests in land* so that individual owners could freely and thoroughly exploit their resource. From the 13<sup>th</sup> century onwards judges and legislatures promulgated property rules that prevented excessive fragmentation of property rights, including fragmentation through time. It is hard to find a single box in which to put all of these rules but Heller uses the term ‘boundary principle’ to describe ‘legal doctrines that separate ... property categories from each other and help to keep resources well-scaled for productive use.’<sup>57</sup> Examples of boundary rules include the *Statute of Quia Emptores 1290*,<sup>58</sup> the estates system<sup>59</sup> and every student’s worst nightmare, the rule against perpetuities.<sup>60</sup>

Arguably the most important boundary rule of property law is the *numerus clausus* principle. *Numerus clausus* or ‘closed list’ is a principle that stipulates

53 In return for aiding the conquest of England, William made grants of land directly to the lords who came with him across the Channel. However, many land grants were fictional, that is the Saxon landowners colluded in the pretence that they owned their land by virtue of grants from William: A W B Simpson, *A History of the Land Law* (Clarendon Press, 2<sup>nd</sup> ed, 1986); Butt, above n 52, 54–5. This accounted for the almost universal inclusion of land in England within the feudal pyramid.

54 Butt, above n 52, 63–5.

55 Ibid 53.

56 Simpson, above n 53, 5; Michael A Heller, ‘The Boundaries of Private Property’ (1999) 108 *Yale Law Journal* 1163, 1171–2.

57 Heller, ‘The Boundaries of Private Property’, above n 56, 1166.

58 *Quia Emptores 1290*, 18 Edw 1, c 1 prohibited alienation of fee simples by subinfeudation. In other words, the owner of the fee could not create a new tenurial relationship with a transferee; he could only transfer the land so that the transferee stood in his shoes. Importantly, a land owner could do this without his overlord’s consent, even though the overlord would be affected by the quality of person who now stood in the place of their former tenant: Charles Harpum, Malcolm Grant and Stuart Bridge, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 6<sup>th</sup> ed, 2000) 27–30.

59 There are three estates in English land law: life estate, fee simple and fee tail. Traditionally, leases were not an estate in land. See Butt, above n 52, 87–95. The mysteries of estates and ‘seisin’ are complicated, but for our purposes here, the relevance is merely that there were very few interests that were recognised as ‘estates’ in land.

60 The rule against perpetuities, in both its common law and statutory forms, essentially requires interests in land to vest within a generation, preventing land owners from determining ownership too long after their own deaths.

that there are limited interests in land. Unlike contract law which allows parties to negotiate almost any contractual term they please, land law will not permit landowners ‘to customise land rights, in the sense of re-working them in an entirely novel way to suit their particular individual needs and circumstances. Rather, any new rights must fit within firmly established pigeonholes, of which the law permits only a small and finite number.’<sup>61</sup> Although strangely overlooked in common law academia until recently,<sup>62</sup> the doctrine has been consistently applied by judges through the centuries. Two of the most famous judicial pronouncements on the principle are found in *Keppell v Bailey*<sup>63</sup> and *Hill v Tupper*.<sup>64</sup> In *Keppell v Bailey*, Lord Brougham said:

it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner. ...[G]reat detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed.<sup>65</sup>

In *Hill v Tupper*, Pollock CB said:

[a] new species of incorporeal hereditament<sup>66</sup> cannot be created at the will and pleasure of the owner of property, but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament.<sup>67</sup>

Rudden notes that ‘[i]n all “non-feudal” systems with which I am familiar (whether earlier, as at Rome, or later), the pattern is (in very general terms) similar: there are less than a dozen sorts of property entitlement’.<sup>68</sup> The steady progression of Anglo property law over the centuries means that we are now down to this small number of property interests, in both their legal and equitable forms: fee simples, life estates, leases, easements, covenants, mortgages, liens and *profits à prendre*. They are a set bundle of rights which owners are not free

61 Brendan Edgeworth, ‘The *Numerus Clausus* Principle in Contemporary Australian Property Law’ (2006) 32 *Monash University Law Review* 387, 387.

62 Merrill and Smith note that while they could only find one full article on the *numerus clausus* principle in the common law and little explicit judicial recognition, there is consistent judicial adherence to the principle in practice: Thomas W Merrill and Henry E Smith, ‘Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle’ (2000) 110 *Yale Law Journal* 1.

63 (1834) 2 My & K 517; 39 ER 1042.

64 (1863) 2 H & C 121; 159 ER 51.

65 (1834) 2 My & K 517; 39 ER 1042, 1049.

66 An incorporeal hereditament is an easement. Medieval lawyers considered land to be a tangible ‘thing’ and thus ‘corporeal’. A right to cross someone else’s land was an intangible ‘thing’ and thus ‘incorporeal’, however, as it was connected to land, it descended to the heir, as opposed to next of kin, and thus was a ‘hereditament’: Simpson, above n 3, 103–15.

67 (1863) 2 H & C 121; 159 ER 51, 53. Rudden provides a list of other judicial pronouncements on the impermissibility of novel rights or ‘fancies’: Bernard Rudden, ‘Economic Theory v Property Law: The *Numerus Clausus* Problem’ in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (Clarendon Press, 1987) 239, 244.

68 Rudden, above n 67, 241, cited in Heller, ‘The Boundaries of Private Property’, above n 56, 1176.

to rearrange (eg, only certain rights are capable of being an easement<sup>69</sup> or a lease).<sup>70</sup>

The most common explanation for the *numerus clausus* principle is economic. It relieves purchasers of the burden of not only finding, but understanding idiosyncratic agreements long-gone predecessors in title might have made. As Rose says, '[i]n a wide and commercialized property market, property law acts as an ax that purposely chops out nuances and niceties in the things traded. Too many complications spoil the market'.<sup>71</sup> And as Edgeworth argues, '[i]f parties were free to restrict the usages of land by agreements capable of binding successors in title indefinitely, land could be shackled in ways that might revive all the impediments to economic reform that were endemic in feudal real property law'.<sup>72</sup>

A good way to illustrate the economic importance of boundary rules like the *numerus clausus* principle and estates system is to examine what happens when they are absent. Heller did this by examining new property rights in post-communist Russia. His research revealed a failure of private property as a result of excessive fragmentation.<sup>73</sup> Heller examined Moscow storefronts in which multiple government departments, local councils and multiple occupiers all had controlling interests. If one party opposed a use, others would be blocked from exercising their rights. As a consequence, storefronts remained empty in a constant state of underuse.

Heller labelled this phenomenon of excessively restricted land the 'tragedy of the anticommons'.<sup>74</sup> The tragedy of the commons is of course the idea that land to which there is unrestricted access will eventually be depleted and destroyed because no single user has a sufficient disincentive to put another cow on the common, but when everyone does so, the common is destroyed.<sup>75</sup> The tragedy of the anticommons is when 'multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse'.<sup>76</sup>

The great risk of anticommons is that it is much easier for owners to fragment property than to re-aggregate it. Fragmentation 'may operate as a one-way ratchet: Because of high transaction costs, strategic behaviours, and cognitive

69 Four criteria for valid easements were laid down in *Re Ellenborough Park* [1956] Ch 131 and easements are still invalidated on these grounds: *Clos Farming Estates Pty Ltd v Easton* (2002) 11 BPR 20, 605.

70 A lease must be certain or capable of being rendered certain in duration: *Wilson v Meudon Pty Ltd* [2005] NSWCA 448.

71 Rose, above n 27, 1917.

72 Edgeworth, above n 61, 394. See also Uriel Reichman, 'Toward a Unified Concept of Servitudes' (1982) 55 *Southern California Law Review* 1177, 1233.

73 Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621.

74 *Ibid*; Heller, 'The Boundaries of Private Property', above n 56.

75 Garrett Hardin, 'The Tragedy of the Commons' (1968) 168 *Science* 1243.

76 Heller, 'The Tragedy of the Anticommons', above n 73, 624.

biases, people may find it easier to divide property than to recombine it.<sup>77</sup> The feudal pyramid is a good case in point. The creation of multiple feudal relationships was relatively easy and swift; their re-aggregation to create a freely functioning modern land market took centuries.<sup>78</sup> It was however largely achieved by the consistent application of boundary rules. In terms of the ‘morality of property’ discussed above, these property rules reflected the value emerging capitalist democracies placed on free trade and economic exploitation of land.

However, boundary principles have more than an economic function; they have an important social function too. One of the greatest projects of property law over the centuries was the freeing of land from ‘dead hand’ family control.<sup>79</sup> A feudal system with a monarch at the top is a social and political system rooted in family ties and status by virtue of birth. Individuals had strong incentives to ensure that land stayed in the hands of their family, which inevitably meant attempting to control its ownership well beyond their own death. A good example is the fee tail estate, the bane of Mr Bennet’s existence in Jane Austen’s *Pride and Prejudice* and the Earl of Grantham in *Downton Abbey*.<sup>80</sup> Fee tails served the social and economic function of protecting family property from dissipation amongst people unrelated by blood. As entailed estates, Mr Bennet’s and the Earl of Grantham’s lands will pass to their eldest male relative, regardless of their subjective needs or desires. The right to determine inheritance had been carved off and left with a predecessor in title. Mr Bennet and the Earl of Grantham’s ability to economically exploit their land was seriously impaired as a result;<sup>81</sup> leases could not be granted for longer than the entail owner’s life,<sup>82</sup> the fee tail could not be mortgaged,<sup>83</sup> nor could it be alienated in its entirety.<sup>84</sup> However, this impaired ability to economically exploit land is just a subset of a

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77 Heller, ‘The Boundaries of Private Property’, above n 56, 1165–6.

78 A good contemporary example is the mass application of restrictive covenants to large-scale residential subdivisions. Covenants can be created with the stroke of a lawyer’s pen, for example, on a single s 88B instrument under the *Conveyancing Act 1919* (NSW) (*‘Conveyancing Act’*). Registration of the plan of subdivision with an s 88B instrument will create hundreds of covenants benefiting and burdening individual lots in the subdivision. However re-aggregation will require hundreds of owners to negotiate and pay for release of the covenants.

79 As Simpson explains, from 1450 to 1700, this process was a back and forth, push and pull between the conflicting desires to see land on an open market and to retain land in the hands of families. Simpson points out that the lawyers and judges who moulded the modern rules on perpetuities were simultaneously great purchasers and great settlers of land: Simpson, above n 53, 208–9.

80 Jane Austen, *Pride and Prejudice* (Harvard Classics Shelf of Fiction, 1917); *Downton Abbey* (Created by Julian Fellowes, Carnival Films and Masterpiece, 2010). *Downton Abbey* is a contemporary British television series written by Julian Fellowes. It opens on 14 April 1912, the date of the sinking of the Titanic. The Earl of Grantham’s presumptive heir, a close cousin, dies on the Titanic, revealing the next closest male heir to be a middle-class Manchester solicitor.

81 Lord Grantham, like many real English aristocrats in the 19<sup>th</sup> and 20<sup>th</sup> century, married an American heiress for her fortune. Despite huge land holdings, entailed estates were not economically profitable in a modern economy.

82 For example, the owner could not grant a lease for longer than his life: Simpson, above n 53, 90–1.

83 Simpson, above n 53, 90.

84 *De Donis Conditionalibus 1285*, 13 Edw 1, c 1. See Butt, above n 52, 125.

wider absence of individual control, an inability to use one's land as one chooses, in economically productive or even unproductive ways.<sup>85</sup>

As early as 1670, Locke had drawn a clear link between the despotic power of families and the despotic power of government, arguing that both parental power and political power must of necessity be limited for society to be civil.<sup>86</sup> Through the 18th and 19th centuries, citizens strove for freedom from their own family dynasties, as well as unrepresentative government, both institutions representing the tail end of an almost extinct feudal system.<sup>87</sup> Criticism of the entail by Jane Austen's characters<sup>88</sup> suggests that by the early 19th century, limits on personal freedom inherent in some estates in land were at odds with newly accepted notions of individual autonomy in emerging liberal democracies. By gradually eradicating 'dead hand control', property law played its part in this project of liberation. Property law adopted the 'moral' convictions of society and in turn helped to strengthen them. The war of attrition property lawyers and judges waged against fee tails for centuries<sup>89</sup> and their final abolition by legislatures in the early 20th century,<sup>90</sup> is just one example. It was one of the many doctrinal developments that now allow modern property scholars to correctly assert that '[v]alues promoted by property include ... the freedom to live one's life on one's own terms'.<sup>91</sup>

Of course the freedom to act as one pleased, to be the master of one's destiny without arbitrary interference from government or family, became the foundational principle of liberal democracy – negative liberty. Its classical exposition is found in John Stuart Mill's *On Liberty*. Mill argued that

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85 Arguably, Mr Bennet being able to divide his land between his five daughters would have been economically unproductive. The rule of primogeniture is itself a boundary rule that prevents the inefficient division of land between too many: Heller, 'The Boundaries of Private Property', above n 56, 1171.

86 Locke, above n 18, 501–5. Locke said that the lack of equality between parents and children was like 'the swaddling clothes [children] art wrapt up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal': at 415.

87 While feudal ownership of land was formally abolished with the *Tenures Abolition Act 1660*, 12 Car 2, c 24, as the land that had been granted to families by the feudal system stayed in their hands, the inequitable concentration of freehold title in the hands of few remained unchanged. Freehold ownership has been extremely slow to dissipate in England and the legislature and courts are still struggling with leasehold enfranchisement today: *Leasehold Reform Act 1967* (UK) c 88; *Leasehold Reform, Housing and Urban Development Act 1993* (UK) c 28; *Commonhold and Leasehold Reform Act 2002* (UK) c 15. See Nigel Thornton Hague, *Leasehold Enfranchisement* (Sweet & Maxwell, 2<sup>nd</sup> ed, 1987); Martin Davey, 'The Onward March of Leasehold Enfranchisement' (1994) 57 *Modern Law Review* 773; Martin Davey, 'Long Residential Leases: Past and Present' in Susan Bright (ed), *Landlord and Tenant Law: Past, Present and Future* (Hart Publishing, 2006) 147.

88 Not only Mrs Bennet, but Lady Catherine de Bourgh, expressly disapproved of entailed estates in *Pride and Prejudice*, which was first published in 1813.

89 The purpose of this war of attrition was to defeat the tail, converting the fee tail to a fee simple, a freely alienable estate. See Simpson, above n 53, 81–91; Harpum, Grant and Bridge, above n 58, 73–5.

90 For example, in NSW, fee tails were converted to fee simples by *Conveyancing Act* ss 19–19A. *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 1 allowed only fee simples or terms of years to exist at law.

91 Alexander et al, above n 28, 743.

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.<sup>92</sup>

This statement, often referred to as ‘the harm principle’, is manifested in property law as the principle that we are free to use our property as we please, so long as the way in which we use it does not harm other people.<sup>93</sup> While negative liberty has its critics, most notably Marx, most contemporary critics do not assert that it is wrong because we *should* be needlessly interfered with by the government and our neighbours, rather they suggest that on its own, it is insufficient for universal human flourishing.<sup>94</sup> Wider academic debates aside, the concept of negative liberty is ingrained in modern property law and in the

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92 John Stewart Mill, *On Liberty* (Ticknor and Fields, 2<sup>nd</sup> ed, 1863) 23; Isaiah Berlin, ‘Two Concepts of Liberty’ in Henry Hardy (ed), *Liberty* (Oxford University Press, 2002) 166. Rudden explores Hegel’s philosophy, concluding that ‘for Hegel, we are fully free only when our property is (relatively) free’: above n 67, 250.

93 Philip Booth, *Planning by Consent: The Origins and Nature of British Developmental Control* (Routledge, 2003) argues planning law always needs an ideological justification before government can regulate people’s land. The Great Fire of London in 1666 provided some justification for building codes, but legitimisation of extensive modern planning regimes did not occur until medical discoveries in the 19<sup>th</sup> century proved definitively that disease, in particular cholera, was water borne. A man’s home might have been his castle, but if what he did on it or discharged from it could kill his neighbours, he could be regulated.

94 It is impossible in this context to do any justice to the extensive scholarship critiquing classical liberalism. The concept of negative liberty has been rightly challenged as insufficient by Charles Taylor, John Rawls, Amartya Sen and Martha Nussbaum, to name a few. Taylor, for example, asks whether we would consider Albania a freer country than Britain because it has fewer traffic lights and citizens are thus routinely less interfered with as they negotiate traffic each day: Charles Taylor, ‘What’s Wrong with Negative Liberty’ in Alan Ryan (ed), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979) 175. Sen and Nussbaum have focussed on ‘capabilities’ and the fact that without government intervention and social assistance, negative liberty simply means that many people will be free to starve: Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2013). For a general account of critiques of liberalism and references, see Gerald Gaus and Shane D Courtland, *Liberalism* (March 2011) The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/spr2011/entries/liberalism/>>. For more specific legal critiques of negative liberty, see, eg, Cass R Sunstein, ‘Legal Interference with Private Preferences’ (1986) 53 *University of Chicago Law Review* 1129.

modern property psyche.<sup>95</sup> It must be stressed that this is not a reference to American-style libertarianism, but merely an acknowledgement of the expectation that most citizens of liberal democracies now have, that they will be free to live and work on their own properties as they please, subject to justifiable government regulation. In a country like Australia, this expectation of freedom with legitimate public regulation is largely uncontested.

In summary, the argument in this Part is that modern property law both reflects and helps constitute liberal democracy and capitalism. By removing the restrictions and obligations attached to land that were part of a feudal system, that is, by creating 'boundary rules', modern property law allowed land ownership to function in ways that were consistent with democratic and capitalist ideals. Owners were free to economically exploit their land as they chose, without regard to others above or below them in a feudal pyramid. They were also free to economically exploit land without restrictions imposed on them by long gone predecessors in title. Finally, this economic freedom became a subset of a wider personal autonomy, the freedom to use one's land as one pleased, whether economically productive or not, without unreasonable interference from family or the state.

#### IV THE FREEHOLD COVENANT

In the centuries that property law strove so hard to rid land of control by multiple parties, concentrating rights in the hands of a single individual,<sup>96</sup> one anomaly appeared – the freehold covenant. *Tulk v Moxhay* held that a purchaser of land could be bound by a covenant purportedly attached to the fee of which he or she had notice.<sup>97</sup> The decision flew in the face of *Keppell v Bailey*<sup>98</sup> and *Hill v Tupper*<sup>99</sup> by allowing an incident of a 'novel kind' to be enforced against a subsequent purchaser; the decision allowed negotiated contractual agreements to transform into property interests that ran with the *freehold* title land. Despite consistent efforts by courts to curb freehold covenants' operation, most notably

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95 Empirical research suggests that people's preconceived idea of the meaning of property affects their resistance to regulation. Nash and Stern demonstrated that if people have a conception of property as absolute dominion over a thing, they are more resistant to regulation than if they perceive property as a bundle of rights which might have some of the sticks in the bundle missing (this latter conception of property is the legal realist theory that has dominated the United States property law, though not lay understanding, for the past century). People's resistance to regulation is also lessened if they are forewarned of the possibility before acquiring title. Nash and Stern argue that if property rights are framed to purchasers as a bundle of sticks, fewer frustrations and disputes will result. While there is undeniable merit in this argument, the research is cited merely to demonstrate that ordinary people come to property with assumptions about noninterference: Jonathan Remy Nash and Stephanie M Stern, 'Property Frames' (2010) 87 *Washington University Law Review* 449.

96 Singer, *Entitlement*, above n 24, 147.

97 (1848) 2 Ph 774; 41 ER 1143.

98 (1834) 2 My & K 517; 39 ER 1042.

99 (1863) 2 H & C 121; 159 ER 51.

by limiting them to restrictions, not positive obligations,<sup>100</sup> and requiring that they benefit land, not a business or person,<sup>101</sup> they grew to become a commonly created interest in land.

The economic theory underpinning freehold covenants<sup>102</sup> is that as we are affected by what others do next door, the ability to prevent harmful land use on adjacent properties is valued by landowners. The problem with restrictive covenants is that the value-enhancing theory does not always work in practice. What seems like a beneficial restriction today may in fact sterilise land tomorrow, radically reducing its worth. Simpson said that:

The effect of restrictive covenants is to sterilize the use of a parcel of land permanently; in principle it is not at all clear that a private landowner ought to be allowed to do this without public control of his activities. Whatever their merits, restrictive covenants can have a very detrimental effect on the free development of land, which is not in all cases in the public interest.<sup>103</sup>

Merrill and Smith acknowledge that freehold covenants are a significant breach of the *numerus clausus* principle,<sup>104</sup> but argue that as they are non-possessory interests, they amount to a ‘fringe area’ of property.<sup>105</sup> This is an unduly optimistic assessment for two reasons. First, while restrictive covenants are not possessory interests, by definition they must attach to a possessory interest, the fee simple. They create a qualified freehold estate, which like a fee tail, a determinable fee simple or a life estate, is a possessory interest partially controlled by someone other than the current possessor.

Secondly, restrictive covenants and their extension, the positive covenant, are the theoretical and ideological basis for strata and community title in Australia, as well as their counterparts around the common law world, such as the United States’ homeowner association (‘HOA’) or common interest development (‘CID’). These are by no means fringe areas of property. In the United States, approximately 60 million people live in 24 million housing units that fall within a HOA or CID.<sup>106</sup> In some areas like Las Vegas, up to 50 per cent of people live in HOAs.<sup>107</sup> In Sydney almost one quarter of the population now lives in strata title.<sup>108</sup> Community title scheme figures are much harder to estimate, but in New

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100 *Haywood v The Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403 (‘Haywood’); *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (‘Austerberry’); *Pirie v The Registrar-General* (1962) 109 CLR 619 (‘Pirie’). For an excellent plain language explanation of this history, see Victorian Law Reform Commission, *Easements and Covenants*, Report No 22 (2010).

101 Outside statute, a covenant cannot exist in gross: *London County Council v Allen* [1914] 3 KB 642; *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227.

102 For a discussion of this theory, see Reichman, above n 72.

103 Simpson, above n 53, 257.

104 Merrill and Smith, ‘Optimal Standardization’, above n 62, 16–17.

105 *Ibid* 23.

106 Evan McKenzie, *Beyond Privatopia: Rethinking Residential Private Government* (Urban Institute Press, 2011) 2.

107 Casey Perkins, ‘Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners’ Associations’ (2010) 10 *Nevada Law Journal* 561, 561–2.

108 Hazel Easthope, Bill Randolph and Sarah Judd, ‘Governing the Compact City: The Role and Effectiveness of Strata Management’ (Research Paper, City Futures Research Centre, University of NSW, May 2012) 8.

South Wales in 2006, 1000 neighbourhood plans and almost 500 community plans had been registered.<sup>109</sup> Community title schemes are often large, for example, the New Rouse Hill scheme in North West Sydney which will have 4500 residents. Further, the Metropolitan Plans for all five major Australian cities include provision for urban densification,<sup>110</sup> which inevitably means a steady growth in strata and community title. Central to any strata or community title scheme is the facility to create private by-laws which attach negative *and positive* obligations to fee simple interests that then unerringly run with the land.

## V FROM COVENANTS TO COMMUNITIES

Restrictive covenants are private planning tools. They are utilised by developers to raise the standard of development in a subdivision, typically mandating building materials, residential use and minimum allotment sizes. Freehold covenants developed in response to the rapid densification of 19<sup>th</sup> century English cities; densification which occurred in the absence of a public planning system prohibiting harmful mixed uses.<sup>111</sup> Private planning through leasehold covenants was common place in 18<sup>th</sup> and 19<sup>th</sup> century London, in particular on the so-called Great Estates,<sup>112</sup> but as freehold ownership dispersed amongst the middle classes in the 19<sup>th</sup> and 20<sup>th</sup> century, freehold covenants took up where leasehold left off. The problem with this movement of covenants from leasehold to freehold land is that leases and their covenants eventually come to

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109 NSW Department of Lands, 'Review of NSW Community Schemes Legislation' (Consultation Paper, NSW Government, June 2006) 4 <[http://www.aramaql.com.au/archive/library/CommunitySchemes/ConsultationPaper\[1\]July06.pdf](http://www.aramaql.com.au/archive/library/CommunitySchemes/ConsultationPaper[1]July06.pdf)>.

110 Hazel Easthope and Sarah Judd, 'Living Well in Greater Density' (Research Paper, City Futures Research Centre, University of NSW, June 2010) 4.

111 Booth, above n 93.

112 Much of the land in English cities was subject to long-term leases, which could function as system of private land use regulation. Good ground landlords, like the Dukes of Bedford and Marlborough used long-term leases to control the development and use of land within their estates: John Summerson, *Georgian London* (MIT Press, 3<sup>rd</sup> ed, 1978); Dan Cruickshank and Neil Burton, *Life in the Georgian City* (Viking, 1990). Other ground landlords were not so conscientious and their land was not well managed. The dissipation of freehold ownership which came with the gradual demise of the feudal system also meant that increasing amounts of land fell outside the 'Great Estates' and their powers of regulation. Both of these factors contributed to the need for a system of public planning.

an end, even if it takes 99 years.<sup>113</sup> Freehold covenants, like the fee simple to which they attach, potentially go on forever.<sup>114</sup>

Freehold covenants were particularly important in countries like Australia and the United States, where long-term leasehold ownership was always politically unfavourable.<sup>115</sup> Freehold covenants facilitated the utopian aims of the Garden Suburb Movement, which sought to house working and middle class families in healthy, spacious, green subdivisions, far from the overdeveloped, teeming slums of 19<sup>th</sup> century metropolises.<sup>116</sup>

The United States has a history of complex private communities created through covenants,<sup>117</sup> which in recent years have had a profound influence in Australia. The United States never adopted the limitation that covenants must be restrictive to run with the fee. Prior to the decision in *Tulk v Moxhay*,<sup>118</sup> the United States had already developed an unusual doctrine of ‘real covenants’, positive obligations attached to the fee, enforceable at law, so long as they ‘touched and concerned’ the land.<sup>119</sup> Reichman argues that American law did not share England’s reticence about freehold restrictions or obligations as a result of the greater availability of land and an early recording system which allowed purchasers to discover negative or affirmative duties that were not always discoverable on physical inspection. Real covenants also dovetailed with the 19<sup>th</sup> century enthusiasm for freedom of contract, offering ‘a potential mechanism

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113 Further, from my observation, it seems that landlords of long-term leases often pay minimal attention to the activities of their tenants, with leases regulating surprisingly little. The good management of the Bedford Estate through leasehold covenants is the exception that proves the rule: Summerson, above n 107.

114 Restrictive covenants can come to an end if they have not been enforced for long periods of time or if the character of the neighbourhood has changed so that there was no utility in their enforcement. Equity would not grant a remedy in these circumstances: *Application of Fox* (1981) 2 BPR 9310. Courts are sometimes expressly empowered to declare that a covenant has become obsolete, for example s 89 of the *Conveyancing Act*, and covenants can be overridden by public planning instruments, for example s 28 *Environmental Planning and Assessment Act 1979* (NSW).

115 Australian government policy has long favoured freehold, not leasehold, ownership in urban (although not rural) areas. For example, John D Fitzgerald, barrister, Chairman of the NSW Housing Board (1912–17) and Minister for Local Government (1916–20) argued that: ‘If you want to make the working man contented, you must give him better housing conditions than he has hitherto had, and let him own his own house in addition. ... [H]uman nature is in favour of the freehold’: Robert Freestone, *Model Communities: The Garden City Movement in Australia* (Nelson, 1989) 96. In the United States, Singer notes a mid-19<sup>th</sup> century New York case in which a judge struck down a requirement that tenants pay one quarter of the purchaser price to a landlord each time they sold land. The judge said that United States property law did not allow such feudal land arrangements: Singer, *The Edges of the Field*, above n 21, 23.

116 Freestone, above n 115.

117 McKenzie, *Privatopia*, above n 40.

118 (1848) 2 Ph 774; 41 ER 1143.

119 Reichman explains that in a 1852 commentary on *Spencer’s Case* (1583) 5 Co Rep 16a; 77 ER 72, an American judge, Hare J, anomalously decided that privity of estate existed in the grantor–grantee relationship, not merely the landlord–tenant relationship, as was and still is the case in Anglo-Australian law: Reichman, above n 72, 1213 ff. The ‘touch and concern’ doctrine effectively operated to allow courts to invalidate value-reducing and publicly undesirable covenants: Reichman, above n 72, 1213 ff. Scotland also developed a doctrine of ‘real burdens’ that allowed positive and negative burdens to attach to the fee: Scottish Law Commission, *Report on Real Burdens*, Report No 181 (2000).

whereby the notion of freedom of contract might be injected into the law of real estate.<sup>120</sup> Rudden points out that this breach of the *numerus clausus* principle made the American states, along with Israel and feudal society, the only land system in 2000 years to have allowed positive obligations to run with the land.<sup>121</sup>

The consequence of this breach of the *numerus clausus* principle was that United States lawyers were able to create master planned communities with common facilities much earlier than Australian lawyers. In *Neponsit Property Owners' Association v Emigrant Industrial Savings Bank*,<sup>122</sup> the New York Supreme Court held that a restriction in a deed requiring all lot owners to pay annual assessments for the maintenance of roads, parks, beaches and sewers touched and concerned the land and ran with the fee. Further, the Court held that the Property Owners' Association, which did not actually own any benefited land itself, could enforce the restriction as agent for the property owners. These two factors – the ability to make monetary payments run with the land and have a collective body to enforce payment – were critical to the rise of HOAs or 'common interest communities' through the 20<sup>th</sup> century in the United States.<sup>123</sup> HOAs have taken over a significant part of the role traditionally played by local government, privatising basic social services and infrastructure.<sup>124</sup> Purchasing a house in a HOA results in the purchaser being bound by a range of positive and negative obligations, referred to as 'CC & Rs' (covenants, conditions and restrictions), as well as by the by-laws of the mandatory-membership association (the body corporate). Obligations range from paying levies or 'dues' to fund roads, parks, pools, woods, lakes and security, to restrictions on house colour, plants, Christmas lights, behaviour, political signs and household composition. In an exhaustive review of the United States' law on covenants in the early 1980s, Reichman warned that the ability to attach positive and negative obligations to land has the potential to create 'modern variations of feudal serfdom'.<sup>125</sup>

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120 Reichman, above n 72, 1217.

121 Rudden, above n 67, 258. So as not to misrepresent Rudden's argument, it must be noted that he seemed unconvinced by the consistent refusal to allow positive obligations to run with the land. With all due respect to Rudden, I am not sure whether he was sufficiently familiar with the type of complex communities that existed in the United States, nor was the essay particularly focussed on the practical implications of allowing positive obligations to run. When he turned his mind briefly to the problem of terminating servitudes, he acknowledged that while it might be feasible with one seller and one buyer, it may not be in a development area. He said, '[p]erhaps, then, there is sense in ... restricting, ere their birth, the class of real rights': Rudden, above n 67, 259.

122 (1938) 278 NY 248, discussed by McKenzie, *Privatopia*, above n 40, 51–5.

123 Another critical factor was rises in land prices, forcing developers to explore ways of giving purchasers the open space amenities they had come to associate with suburban living, without providing individually owned open space: see McKenzie, *Privatopia*, above n 40, 83–94.

124 McKenzie, *Privatopia*, above n 40; Nelson, above n 17. James Buchanan's 'club goods theory' and Charles Tiebout's theory of residential area 'shopping' have been highly influential in the United States: James M Buchanan, 'An Economic Theory of Clubs' (1965) 32 *Economica* 1; Charles M Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *Journal of Political Economy* 416.

125 Reichman, above n 72, 1233.

Because of the qualification on *Tulk v Moxhay*<sup>126</sup> that equity would not enforce positive aspects of covenants,<sup>127</sup> there was no corresponding development of complex private communities in Australia during the 20th century. The litmus test for whether a covenant is positive is whether it requires the expenditure of money; if it does so, it is unenforceable.<sup>128</sup> If you cannot make people pay for facilities such as tennis courts, parks, club houses and pools, there is no point providing them. The result was that while we had master planned communities,<sup>129</sup> our communities were minimalist.<sup>130</sup> They rarely contained common property, restrictions were limited to 'brick and tile' covenants, or similar provisions, and there was no need for a collective body of owners to manage levies. As purely private regulation needing neighbour to sue neighbour to enforce them, restrictive covenants were often more honoured in their breach than observance.<sup>131</sup>

While Australia could manage to house citizens and create secure title to low rise housing without the legal facility to attach to the fee an obligation to pay money, it could not do so once reinforced steel frames, curtain walls and reliable safe lifts made high rise building possible.<sup>132</sup> High rise buildings inevitably have collectively used property – the lift, foyer and stairs – which needs to be maintained. While leasehold ownership or company title can be used, both fall short of the Australian expectation of ownership of a fee simple in land. Further, in high density housing, neighbours affect each other more easily than in low density estates and thus, rules to regulate land use are necessary. The solution to both of these dilemmas was found in legislation.

The *Conveyancing (Strata Titles) Act 1961* (NSW)<sup>133</sup> facilitated not only the creation of freehold Torrens title to parcels of air, but the ability to attach negative *and positive* obligations to those titles in the form of registered by-laws, as well as the obligation to pay levies. Registered by-laws regulate use of common property *and* individual lots, while levies compel payment of money to maintain the former. By-laws unerringly run with the land, and unlike restrictive

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126 (1848) 2 Ph 774; 41 ER 1143.

127 *Haywood* (1881) 8 QBD 403; *Austerberry* (1885) 29 Ch D 750; *Pirie* (1962) 109 CLR 619.

128 *Pirie* (1962) 109 CLR 619.

129 Freestone, above n 115.

130 Sherry, 'The Legal Fundamentals', above n 2, 1–3.

131 Inheritance analysed the historic integrity of Rosebery, a 20<sup>th</sup> century Sydney garden suburb, planned with restrictive covenants: 'Final Heritage Assessment Report of Rosebery Estate' (Report, Inheritance, July 2006). Houses were classified as either 'contributory' (retained original form and detailing), 'neutral' (some alternations but still recognisable as from the period Rosebery was developed) or 'detracting' (so altered that their original construction is not recognisable). It concluded that Rosebery's integrity (ie, compliance with the restrictive covenant) was only 43 per cent. For details of the covenant that was originally imposed on the planned estate of Rosebery, see *Brotherton v Sydney City Council* [2004] NSWLEC 475. See also Freestone, above n 115. Cf Haberfield in Sydney's Inner West, where the private restrictive covenants remained effective and the area is now publicly protected as a heritage conservation area: Ashfield Council, *Ashfield Development Control Plan 2007* (21 May 2007).

132 Edward Glaeser, 'How Skyscrapers Can Save the City', *The Atlantic* (online), 9 February 2011 <<http://www.theatlantic.com/magazine/archive/2011/03/how-skyscrapers-can-save-the-city/308387>>.

133 The *SSFDA* and *SSMA* now replace the original Act.

covenants, are not enforced by individuals. The legislation automatically creates a body corporate, a mini-government, which enforces by-laws in a quasi-public impersonal capacity.

By the 1980s, the strata title framework was being extended to horizontal subdivisions.<sup>134</sup> These did not necessarily need common property or by-laws in the way that high rise buildings do, but using United States HOAs as a model, developers saw the provision of facilities and community rules as potentially attractive to the market. By the 1990s, as had happened in the United States from the 1960s, state and local governments also recognised the attraction of community title. Privately owned roads, parks, pools, wetlands, bush reserves, sewers and water supplies, permanently remove significant infrastructure and amenity costs from the public purse. Horizontal community title subdivisions are now used for large brownfields and greenfields developments with hundreds of homes and thousands of residents.

While it is readily conceded that both the ability to regulate land use and the imposition of obligations to pay money to maintain common property are essential in high density dwellings, they are not in low rise subdivisions. Low rise subdivisions can be created without common property or by-laws, as suburbs always have been in Australia. However, even when by-laws and common property are necessary, New South Wales courts and legislatures have embraced these novel forms of property with insufficient appreciation of their implications. It is to this we now turn.

## VI THE NEW FEUDALISM

In New South Wales, the legislature and judiciary have given by-laws an extremely wide ambit. Section 47 of the *SSMA* states that by-laws must be for the ‘the control, management, administration, use or enjoyment of the lots or the lots and common property’, a description that few by-laws fail to meet.<sup>135</sup> By-laws cannot ban children, guide dogs, leasing or transfer,<sup>136</sup> or be based on ‘race or creed, or on ethnic or socio-economic grouping’;<sup>137</sup> they must be consistent with

134 The first large-scale, low rise body corporate community was the iconic Sanctuary Cove in South East Qld. It needed its own legislation, the *Sanctuary Cove Resort Act 1985* (Qld), to facilitate its development. See Sanctuary Cove <<http://www.sanctuarycove.com>>. In NSW, separate legislation was enacted for horizontal subdivisions, the *CLDA* and the *CLMA*, but in most states a single act is used for high and low rise development, for example *Body Corporate and Community Management Act 1997* (Qld) (*‘BCCMA’*).

135 This is the section that defines the power of a body corporate to alter its by-laws. There is no similar provision in relation to the original by-laws required to be registered at the inception of the strata scheme, but Young JA in *Casuarina Rec Club Pty Ltd v The Owners – Strata Plan No 77971* (2011) 80 NSWLR 711, 718 [49] (*‘Casuarina’*) said that there was no reason to assume the original by-law making power was any narrower. By-laws in community title management statements have a similarly wide definition: *CLDA* sch 3; *CLMA* s 14.

136 *SSMA* s 49.

137 *CLDA* sch 3 cl 5.

the *SSMA* or any other law or Act,<sup>138</sup> and are theoretically subject to the principles governing the validity of delegated legislation.<sup>139</sup> In a recent obiter comment, Young JA said that by-laws must be ‘reasonable’, but there is no New South Wales case law in this regard.<sup>140</sup>

An expansive definition of by-laws has been consistently supported by courts. By-laws can be positive or negative and they can create proprietary interests that do not comply with the *numerus clausus* principle.<sup>141</sup> In *White v Betalli*, upholding a by-law granting one owner the right to store a boat inside another owners’ private lot, Campbell JA said:

There is nothing in the notion of a by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted, beyond that it is for the regulation of the particular community to which it applies. Any limitation on the type of restriction or regulation that can be a by-law must arise from the statute that enables the by-laws to be created, or from the general framework of statute law, common law and equity within which that local community is created and administered.<sup>142</sup>

The New South Wales legislation makes no distinction between the content of by-laws at the inception of a development and altered by-laws. While purchasers should be aware of existing by-laws which are clearly recorded on the Torrens register, they cannot be aware of potential by-laws their neighbours may create in the future with the appropriate majority.<sup>143</sup>

138 *SSMA* s 43(4). However the effectiveness of this provision is questionable. Lawyers routinely write ‘empowering’ by-laws that purport to give bodies corporate powers to act that they do not have under the legislation. By definition these by-laws must be inconsistent with the *SSMA* and *SSFDA*, but there is no case law invalidating them.

139 This is a largely untested area: *Lynch, Glenn and Jenny Owners of Lot 75a v The Owners Strata Plan No 36458* [1999] NSWSSB 55 (Member Grinston); *Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344, 352–62 [29]–[72] (McColl JA) (‘Tate’).

140 *Casuarina* (2011) 80 NSWLR 711, 722 [89]. Cf United States case law which has consistently applied the principle that rules of homeowner associations and condominiums be ‘reasonable’: *Hidden Harbour Estates v Norman*, 309 So 2d 180 (D Fla, 1975).

141 In *White v Betalli* (2007) 71 NSWLR 381 Santow JA at 388 [32] said that:

[T]he strata titles legislation creates an alternative mode for creating what is in the nature of an easement or restrictive covenant, with its own detailed prescription distinct from that under the *Conveyancing Act*. That mode has its own quite distinct legal requirements and consequences such as how one alters a particular restriction.

In this case the Court upheld a by-law that allowed one lot to store a boat inside another lot. See Cathy Sherry, ‘How Indefeasible is Your Strata Title? Unresolved Problems in Strata and Community Title’ (2009) 21(2) *Bond Law Review* 159.

142 (2007) 71 NSWLR 381, 419 [205], cited with approval by Young JA, with whom Macfarlan JA and Handley AJA agreed, in *Casuarina* (2011) 80 NSWLR 711, 716 [30]. See also *Italian Forum Limited v Owners – Strata Plan 60919* [2012] NSWSC 895 (‘*Italian Forum*’).

143 *SSMA* s 47; *CLMA* s 14.

Unlike the United States,<sup>144</sup> there is almost no recognition in Australian judicial reasoning or legislation that many by-laws are the statutory equivalent of restrictive and positive covenants, interests which for centuries the law has either completely disallowed (positive obligations) or only grudgingly permitted (restrictions). There is no recognition that by-laws sweep away the *numerus clausus* principle, the cardinal rule that prevents ‘incidents of a novel kind [being] devised and attached to property at the fancy or caprice of any owner.’<sup>145</sup> Developers, and subject to appropriate majority vote, subsequent owners, have been given carte blanche to burden fee simple interests with almost any obligation or restriction they desire.<sup>146</sup> By-laws just need to relate to lots or common property to be valid. While this might look like a ‘touch and concern’ requirement, it has not operated as the ‘touch and concern’ doctrine has in Anglo-Australian lease law or United States servitude law, to invalidate obligations and restrictions that are personal and/or do not enhance the value of land.<sup>147</sup>

Case law has analysed by-laws as commercial contracts, delegated legislation or a statutory contract,<sup>148</sup> drawing analogies with administrative and corporate law, but failed to make the connection with property law<sup>149</sup> and recognise that

144 The United States had an active judicial and academic debate about servitude law (covenants, easements, profits), particularly as they relate to homeowner associations. Academic debate was concentrated in the 20 year period between the publication of a symposium on servitude law in volume 55 of the *Southern California Law Review* in 1982 and the release of the *Restatement (Third) of Property (Servitudes)* in 2000. For an indication of the well-developed nature of United States covenant and homeowner association law, see Wayne S Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* (American Law Institute–American Bar Association, 3<sup>rd</sup> ed, 2000). This kind of detailed property-focused debate has been almost entirely absent in Australia. A notable exception is the Victorian Law Reform Commission’s report on easements and covenants. The Commission discussed the nature and purpose of covenants generally, and with reference to strata and community title. The Commission decided against the introduction of private positive covenants in Victoria: above n 100, 74–91.

145 *Keppell v Bailey* (1834) 2 My & K 517; 39 ER 1042, 1049 (Lord Brougham).

146 Merrill and Smith mistakenly assume that as a product of legislation, United States condominiums are consistent with the *numerus clausus* principle: ‘Optimal Standardization’, above n 62, 16. What this fails to appreciate is that by-laws and condominium rules are not legislatively created obligations and restrictions on land; they are privately created obligations which are then given legislative force. They are not like the narrowly crafted positive obligations that are now permissible for public authorities under *Conveyancing Act* ss 88D–88F; their content is largely determined by private decisions.

147 While the ‘touch and concern’ doctrine produced extraordinary complexity in the United States servitude law, it allowed courts to invalidate value-reducing and publicly harmful covenants: Reichman, above n 72; Susan F French, ‘Toward a Modern Law of Servitudes: Reweaving the Ancient Strands’ (1982) 55 *Southern California Law Review* 1261. It was theoretically replaced by *Restatement (Third) of Property (Servitudes)* (2000) §§ 3.1; 3.4–3.7, with a prohibition on servitudes that are illegal; unconstitutional; against public policy; unconscionable; or impose unreasonable restraints on alienation or undue restraints on trade. The *Restatement* said that ‘it is not intended to remove courts from their historic role of safeguarding the public interest in maintaining the social utility of land resources. By reformulating the inquiry to ask the question directly – whether the servitude in issue poses such a threat to the public welfare that the rights or obligations it creates should not be allowed to run with land – the law will encourage clearer identification of the issues and clearer explanations of the reasons why servitudes may not be used to implement particular arrangements than was ever possible using the touch-or-concern doctrine’: American Law Institute, *Restatement (Third) of Property (Servitudes)* (2000) § 3.2 cmts (a).

148 *Tate* (2007) 70 NSWLR 344.

149 Sherry, ‘How Indefeasible is Your Strata Title?’, above n 141.

the exceptionally broad ambit of by-laws has removed many protections that property doctrines provided for centuries to fee simple interests. By-laws allow multiple owners, both past and present, to control the use and enjoyment of an existing owner's fee simple. Sometimes this is justifiable, for example noise restrictions, but sometimes, as we will see below, it is not. Either way, the existence of by-laws results in individual lot ownership being fragmented, by all lot owners having potentially almost unlimited rights over each other's land.

Further, planners, developers, state and local governments do not seem to appreciate the danger of fragmenting large swathes of land and assets between hundreds of owners, by designating it common property in strata and community schemes (although current debates over termination of old strata schemes might be concentrating their minds).<sup>150</sup> Sometimes this fragmentation is unavoidable,<sup>151</sup> in the case of the framework of a high rise building, but in other circumstances it is optional, for example the strata titling of a tourist resort or the inclusion of an environmentally sensitive wetland or complex black or greywater sewerage treatment plant in common property.

In the final discussion in this article, we will examine the kinds of communities that have developed as a result of the liberal use of strata and community title by planners, developers, local councils and state governments, and by the subsequent expansive approach courts and the legislature have taken to by-laws. In short, we will examine the practical implications of a property system failing to use the boundary rules that property law has assiduously applied for centuries.

### **A Land Markets and Anticommons: Eco-communities and Tourist Resorts**

While most people associate strata title with residential housing, it in fact encompasses commercial, industrial and retirement developments, and is particularly popular for eco-communities<sup>152</sup> and tourism. In relation to eco-communities, by-laws provide stringent enduring restrictions and obligations relating to ecologically sound use of land, and common property provides a mechanism for the collective ownership of open space that the community would

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150 NSW Fair Trading, 'Making NSW No 1 Again: Shaping Future Communities: Strata and Community Title Law Reform Discussion Paper' (Discussion Paper, NSW Government, 15 September 2012) 22–6. See also Cathy Sherry, 'Termination of Strata Schemes in New South Wales – Proposals for Reform' (2006) 13 *Australian Property Law Journal* 227.

151 I say 'unavoidable' on the assumption, described above, that Australians want to own freehold interests. Subdividing buildings with leases allows the freehold to remain in the hands of a single owner, however, with the notable exception of premium high rise in central business districts, the freeholds of high rise buildings in Australia are overwhelmingly subdivided with strata title, resulting in co-ownership of the framework of the building.

152 For example, a number of communes or intentional communities in Byron Shire Council in northern NSW have recently converted from multiple occupancies to community title: *Multiple Occupancies to Community Title* (February 2009) Byron Shire Council <<http://www.byron.nsw.gov.au/multiple-occupancies-to-community-title>>.

like to protect and/or remediate.<sup>153</sup> While the impetus for eco-communities is laudable, their realisation through binding restrictions and obligations on land, just like restrictive covenants, is a double-edged sword. Rosneath Farm, a pioneering strata project located in the south west corner of Western Australia, is a good case in point.

The by-laws for Rosneath Farm included obligations for owners to attend a permaculture course, to only build and use land in accordance with permaculture and pattern language principles, to allow pets to be trapped and removed if caught out at night and to provide a house key to the body corporate.<sup>154</sup> These by-laws initially had the effect of increasing the value of the land by making it desirable to a pool of ecologically-minded purchasers. However, when Western Australian land prices sky rocketed, the by-laws had the opposite effect.<sup>155</sup> Few people outside the eco-community market were prepared to accept such restrictions and obligations and the land became effectively unsaleable. Indeed, the pervasive nature of the by-laws at Rosneath Farm justified Reichman's description of communities with multiple obligations attached to the fee as 'modern variations of feudal serfdom.'<sup>156</sup> While strata legislation provides a built-in mechanism for the change or removal of by-laws, this is not easily done. That is the whole point of private planning provisions like by-laws or restrictive covenants; to be effective, they must endure. Under all states' legislation a special majority or sometimes a unanimous vote is required to remove by-laws, which effectively entrenches many in perpetuity.<sup>157</sup> In the case of Rosneath Farm, the owners who did not want the by-laws could not garner the vote to remove them or even succeed in having a court do so.<sup>158</sup> This is an example of what Heller describes as the 'one-way ratchet' of fragmentation: '[b]ecause of high transaction costs, strategic behaviours, and cognitive biases, people may find it easier to divide property than to recombine it.'<sup>159</sup> Further, like the Moscow

153 The Ecovillage at Currumbin, in South East Qld, is a *BCCMA* community, developed on a former dairy farm with the aim, inter alia, of remediating the damaged agricultural land to its original biodiverse state. Eighty per cent of land has been left as open space and by-laws mandate solar power and solar sympathetic house siting, recycling of water and waste: *Home* (2013) The Ecovillage at Currumbin <<http://theecovillage.com.au/site/index.php/village/index/2>>.

154 *Grant and The Owners of Rosneath Farm – Strata Plan 35452* [2006] WASAT 162 (Unreported, Member Raymond, 22 June 2006) ('*Rosneath Farm*').

155 Rob Bennett, 'Eco-Village Soon but a Memory', *Busselton Dunsborough Mail* (online), 13 February 2008 <<http://www.busseltonmail.com.au/news/local/news/general/ecovillage-soon-but-a-memory/282710.aspx>>.

156 Reichman, above n 72, 1233.

157 In NSW, by-laws generally require a special resolution to be altered: *SSMA* s 47; *CLMA* s 14. See also *Unit Titles Act 2001* (ACT) s 128(2); *Strata Titles Act 1988* (SA) s 19(2); *Strata Titles Act 1985* (WA) s 42(2); *Owners Corporation Act 2006* (Vic) s 96. However, for by-laws controlling the 'essence' or 'theme' of a community scheme require unanimous resolution for alteration: see, eg, *CLMA* s 17(2); *Unit Titles Schemes Act 2009* (NT) s 21(1). In Qld, scheme statements can be altered by special resolution: *BCCMA* s 62.

158 *Rosneath Farm* [2006] WASAT 162 was an attempt to attack the validity of many of the by-laws, however the Tribunal upheld most.

159 Heller, 'The Boundaries of Private Property', above n 56, 1165–6.

storefronts Heller examined, common property fragmented by co-ownership and binding by-laws, and lot property fragmented by the latter, can become unusable when multiple owners cannot agree on use. To become economically viable again, Rosneath Farm had to be re-subdivided as ordinary rural residential land, free of private restrictions.

Strata title tourist resorts and serviced apartments<sup>160</sup> provide an even better example of an anticommmons, or land that has become underused or dysfunctional as a result of ownership and control being split between too many diverse parties. These schemes are the subject of increasing litigation, revealing intense dissatisfaction amongst owners.<sup>161</sup> The driving force for strata tourism is that strata title allows developers to ‘spread the risk originally assumed by the developer (and banking institution) amongst many investors (usually unsophisticated) and many institutions, who provide the capital for the development to proceed’.<sup>162</sup> In other words, rather than having to find all of their own finance for the development, developers rely on multiple mum-and-dad investors securing individual loans for off-the-plan apartment purchases. People go to the Gold Coast for a holiday and come back as property investors.

The legal structure for strata tourist developments requires the body corporate to be contractually bound to engage an ongoing management provider. The management provider will be entitled to run a letting pool, giving it an income stream from holiday rentals, in addition to management fees paid by the body corporate. This package, along with a caretaker unit and/or reception desk, is referred to as ‘management rights’<sup>163</sup> and developers sell them for profit.<sup>164</sup> Some strata tourist developments involve multiple contracts between the body corporate and service providers, for example, a security company or a local health club or gym.<sup>165</sup> None of these contracts will have been negotiated by the

160 Strata title is one of the fastest growing sectors of the tourist industry in Australia with serviced apartments, the majority of which are strata titled, predicted to reach 60 per cent of all new tourist room stock in Australia in the short term: Jones Lang LaSalle Hotels, *Hotels and Serviced Apartments: Obstacles to Convergence* (Jones Lang LaSalle Hotels, 2005), cited in Kelly Cassidy and Chris Guilding, ‘Defining an Emerging Tourism Industry Sub-sector: Who are the Strata Titled Tourism Accommodation Stakeholders?’ (2010) 29 *International Journal of Hospitality Management* 421, 421.

161 *Humphries v Proprietors Surfervs Palms North Group Titles Plan 1955* (1994) 179 CLR 597 (‘*Humphries*’); *Santai v The Owners – Strata Plan No 77971* [2010] NSWSC 628 (‘*Santai*’); *Casuarina* (2011) 80 NSWLR 711; *Waldorf Apartment Hotel, The Entrance Pty Ltd v Owners Corp SP 71623* [2010] NSWCA 226; *The Owners Strata Plan No 64972 v Rinbac Pty Ltd* [2009] NSWSC 745; *Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No 2 Pty Ltd* [2010] NSWLEC 181; *Oaks Hotels and Resorts (NSW) No 2 Pty Ltd v Council of the City of Sydney* [2011] NSWLEC 1054.

162 Cassidy and Guilding, ‘Defining an Emerging Tourism Industry Sub-sector’, above n 160, 421.

163 Gary Bugden, ‘Management Rights: Developments in Building Management Agreements for Strata Schemes’ (2003) 41(3) *Law Society Journal* 42.

164 In Qld this is specifically permitted under *BCCMA* s 112(2), but in NSW it has been held to be a breach of a fiduciary duty owed by the developer to the body corporate: *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527. Despite this, developers still engage in the practice. See Cathy Sherry, ‘Long-Term Management Contracts and Developer Abuse in New South Wales’ in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds), *Multi-owned Housing: Law, Power and Practice* (Ashgate Publishing, 2010).

165 *Santai* [2010] NSWSC 628; *Casuarina* (2011) 80 NSWLR 711.

body corporate made up of apartment owners; they will all have been negotiated by the developer so that the tourist structure is in place prior to the sale of apartments.

A crucial part of this structure is the very expansive by-law making power the legislature has given to bodies corporate and which courts have consistently confirmed. Crucially, legal precedent suggests that if a body corporate does not have the express or implied power to do something under the legislation – for example enter into a long-term contract with a service provider – then the body corporate can enact a by-law empowering itself to do so, as long as the by-law relates to lots or common property.<sup>166</sup> The New South Wales Court of Appeal recently confirmed this power in *Casuarina*, where the Court upheld a by-law authorising the body corporate to enter into a ‘facilities agreement’ with a recreation club 15 minutes away, because the by-law related to the use or enjoyment of the lots and common property.<sup>167</sup> If the empowering by-law was valid, the contractual agreement pursuant to it, negotiated by the developer, obliging the body corporate to pay a continuing fee to the local recreation club (regardless of actual guest use), was valid too.<sup>168</sup>

*Casuarina* is a seminal decision for strata title practice, with application well beyond strata tourism. Unfortunately, it also offends the fundamental principles of land law discussed in Part III in two ways. First, it allows developers and/or bodies corporate to create by-laws authorising all manner of contracts, burdening lot owners with unlimited financial obligations. These are effectively positive burdens on their land. On purchasing a lot, an owner becomes a member of the body corporate and bound to discharge its obligations and debts in proportion to their unit entitlement. Contracts could be made with a string quartet or disc jockey to play in the common property garden every night, with a feng shui consultant to align all furniture outside or even *inside* lots, or with a gourmet chef to run special cooking classes on the common property barbecues. All would squarely relate to the use or enjoyment of lots and/or common property. While these contracts eventually may come to an end, it should be noted that in *Italian Forum*, White J, in obiter comments, suggested that a by-law authorising the

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166 *Humphries* (1994) 179 CLR 597, 604 (Brennan and Toohey JJ); *Travis v Proprietors of Strata Plan No 3740* (1969) 90 WN (Pt 1) (NSW) 711. It is arguable that all of these by-laws are now invalid under *SSMA* s 43(4), but they are never held to be.

167 The by-law had been created by the developer at the inception of the scheme. While there is no express provision on the purpose of original by-laws, Young JA held that the original by-law making power could be no narrower than the power to make new by-laws in s 47 of the *SSMA*: *Casuarina* (2011) 80 NSWLR 711, 718 [49].

168 *Casuarina* overturned the decision of McDougall J in *Santai*, who had held that the by-law did not involve ‘the management or control of the common property, or any of the functions of the Owners Corporation under the [*SSMA*] or other relevant legislation’: [2010] NSWSC 628, [117]. As a result, the ‘facilities agreement’ was invalid and the owners corporation was not bound by it. It is suggested that Justice McDougall’s attempt to limit the ambit of by-laws was correct.

body corporate to directly collect \$60 000 a year in ‘promotional levies’ for an Italian cultural centre was valid.<sup>169</sup>

Courts do not appear to have been asked to reflect on the fact that if the fee simple interests of lot owners were outside a strata or community titles scheme, any imposition of an obligation to pay money by a predecessor in title would be invalid,<sup>170</sup> and that while an obligation to pay money for the *genuine maintenance and repair* of the commonly owned land is ‘justificatory practice’ in strata and community schemes, the obligation to pay money for any activity whatsoever that relates to the ‘use or enjoyment’ of lots or common property is not. That purchasers are theoretically made aware of these obligations before they buy is not an answer, firstly because many are not in fact aware,<sup>171</sup> and secondly because by-laws can be created *after* purchase and their financial burden imposed on some owners without their consent.

Common sense and hundreds of years of land law tell us that fee simple interests, burdened by unlimited and potentially unknowable obligations to pay money for services an owner may not want or need, will eventually become unmarketable. As Heller says, while fragmentation can be initially wealth creating (eg, for the developers or contract holders, or even the lot owner recipients of valued services), ‘owners may make mistakes, or their self-interest may clash with social welfare’.<sup>172</sup> As strata and community title rapidly multiply across our cities, the presence of financially burdensome by-laws will undermine

169 [2012] NSWSC 895, [51]–[53]. Acting Justice Patten had held otherwise in relation to the same by-law in *The Owners Strata Plan No 60919 v Consumer Trader and Tenancy Tribunal*, finding that a body corporate only has the power to raise money in accordance with the levying power in the legislation: [2009] NSWSC 1158. The existence of such disagreement between superior court judges indicates these issues do not seem to have been sufficiently thought through. *Italian Forum* involved the validity of a strata management statement in a stratum subdivision under NSW’s *Conveyancing Act* pt 23 div 3B. Stratum subdivisions are the division of a building into multiple parcels, some of which may be further subdivided by a strata plan. The upshot is that a single building may house multiple separate strata schemes and non-strata lots, the interaction of which are governed by a registered strata management statement. This must include provisions on disputes, damage and insurance, and may include safety, security, garbage, service providers, noise and trading activities, but is explicitly not limited to these: *SSFDA* sch 1C. The result is a registered dealing that binds freehold titles and has even fewer constraints than strata by-laws; hence Justice White’s conclusion on the validity of a requirement for the residential and commercial strata schemes to pay the parcel owned by Italian Forum Ltd \$60 000 a year in ‘promotional levies’.

170 Cf *Conveyancing Act* s 88BA which now allows the imposition of positive obligations to repair the site of an easement.

171 There is significant United States academic discussion of the true value of consent in relation to the extensive restrictions and obligations in HOAs and condominiums: Stewart E Sterk, ‘Foresight and the Law of Servitudes’ (1988) 73 *Cornell Law Review* 956; James L Winokur, ‘The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity’ [1989] *Wisconsin Law Review* 1; Robert G Natelson, ‘Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association’ (1990) 51 *Ohio State Law Journal* 41. Even though the Australian Torrens system seems infinitely more reliable than the recording system in many American states, the fact remains that with lever-arch folder thick sales contracts, many purchasers (and possibly their lawyers) do not read or understand the ancillary contractual obligations and by-laws that are being disclosed.

172 Heller, ‘The Boundaries of Private Property’, above n 56, 1165.

our freely functioning land market. Purchasers will no longer be able to acquire and economically exploit fee simple interests knowing that they will only be burdened by the genuine and justifiable expenses associated with land (eg, council rates, insurance, maintenance and repair). Like feudal possessors, they will find themselves enmeshed in complex relationships of monetary and even personal obligation,<sup>173</sup> created by other parties, many of whom (eg, developers) no longer have any interest in the land.

The second ramification of *Casuarina* is that it increases the number of people with rights of veto and control over land, in addition to the *already multiple* lot owners. Lot owners cannot vote to use the common property in ways that would violate third party contractual rights. Like feudal land, no one person has complete control. Research on strata titled tourist developments,<sup>174</sup> media reports,<sup>175</sup> and reported cases,<sup>176</sup> all suggest that the conflicting interests and ambitions of stakeholders is a persistent problem, particularly in relation to long-term planning for maintenance and rational use. A strata scheme with resident owners, investor owners, a lingering developer, a management rights owner and other contract holders, is an archetypical anticommmons, with 'multiple owners ... each endowed with the right to exclude others from a scarce resource, and no one [having] an effective privilege of use'.<sup>177</sup> By their very nature, all strata schemes present an anticommmons risk,<sup>178</sup> but this is exacerbated by the presence of management and other service contracts supported by by-laws. For some rights holders, the land is a home, for others it is an investment, and for the management company, it is their livelihood. If you have ever wondered why Surfers Paradise looks so tired and run-down, the answer is because it is the birthplace of the management rights industry,<sup>179</sup> and now made up of multiple intractable anticommmons. An anticommmons is a dysfunctional form of property that traditional boundary rules have sought for centuries to prevent, and in the absence of those boundary rules, we are consistently creating.

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173 The Tribunal in *Rosneath Farm* [2006] WASAT 162 did not seem have to have difficulty declaring that a by-law that compelled someone to attend a permaculture course was valid.

174 Cassidy and Guilding, 'Defining an Emerging Tourism Industry Sub-sector', above n 160; Chris Guilding et al, 'An Agency Theory Perspective on the Owner/Manager Relationship in Tourism-Based Condominiums' (2005) 26 *Tourism Management* 409; Jan Warnken and Chris Guilding, 'Multi-Ownership of Tourism Accommodation Complexes: A Critique of Types, Relative Merits, and Challenges Arising' (2009) 30 *Tourism Management* 704; Kelly Cassidy and Chris Guilding, 'Management Models and Differential Agency Challenges Arising in Australian Multi-Titled Tourism Accommodation Properties' (2011) 32 *Tourism Management* 1271.

175 Su-Lin Tan, 'Meriton's War of World Tower', *The Sydney Morning Herald* (online), 5 January 2013 <<http://www.smh.com.au/business/property/meritons-war-of-world-tower-20130104-2c8xn.html>>.

176 See above n 161.

177 Heller, 'The Tragedy of the Anticommmons', above n 73, 624.

178 Demonstrated by the current dilemma of how to terminate run-down older schemes: NSW Fair Trading, above n 150, 22–6; Sherry 'Termination of Strata Schemes in New South Wales', above n 150.

179 Bugden, above n 163.

## B Liberal Democracy and Personal Autonomy

In Part III we saw that the progress of land law gradually eradicating doctrines that limited possessors' control and use of land promoted more than economic freedom; it promoted one of the most cherished principles of liberal democracy, negative liberty. We noted that, wider academic debates aside, the ability to do as one pleases on one's own land, subject to justifiable public regulation, remains a fundamental assumption of citizens of liberal democracies. Modern property rights enable us 'to exercise autonomy, to enjoy our liberties, to shape our destiny, to form relationships with others';<sup>180</sup> they secure the freedom to 'live one's life on one's own terms'.<sup>181</sup>

New South Wales strata and community title law diverges from orthodox doctrines of property law, both by allowing *private* regulation of other peoples' land, and by allowing regulation of activity that does not harm others. The latter is what property theorists would call 'self-regarding', as opposed to 'other-regarding' acts.<sup>182</sup> Private regulation of *common property* is theoretically nothing more than the ordinary right property owners have to control the use of their own land, however regulation of *individually owned lots* is the private regulation of other citizens' land; in essence private citizens have been given the power to write laws for their neighbours. In high density schemes where people have a greater potential to adversely affect others, this novel right amounts to 'justificatory practice'. No one should be allowed to lay floorboards in their apartment with no regard to the fact that every step they take disturbs their neighbours.<sup>183</sup> The right to regulate 'other regarding' behaviour helps to 'construct and reflect the ideal ways in which people interact in a given category of social contexts [eg, a strata community] ... with respect to a given category of resources [eg, high density residential housing]'.<sup>184</sup> However, the right to regulate behaviour that has no effect on others cannot be so justified.

Examples of by-laws that regulate self-regarding behaviour are by-laws that implement blanket restrictions on pets or pet restrictions based on size or weight. If readers will excuse the pun, pets are not a petty issue. The freedom to keep a companion animal is central to many people's daily lives and wellbeing,<sup>185</sup> and the inability to keep a pet is a source of significant distress and litigation in strata schemes. This is not the biased argument of an animal lover. I do not actually like dogs much, but whether I like dogs is irrelevant to whether my neighbour is allowed to have one in their own home. If the dog barks all day and night, that is

180 Singer, *The Edges of the Field*, above n 21, 27.

181 Alexander et al, above n 28, 743.

182 Singer, 'How Property Norms Construct the Externalities of Ownership', above n 32.

183 The model by-law, used by most schemes, states that, '[a]n owner of a lot must ensure that all floor space within the lot is covered or otherwise treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot': *SSMA* sch 1 cl 14(1).

184 Dagan, 'The Limited Autonomy of Private Law', above n 22, 815.

185 For a persuasive judicial defence of pets, see the dissenting judgment of Arabian J in *Nahrstedt v Lakeside Village Condominium Association*, 878 P 2d 1275 (Cal, 1994), a leading United States case on cats in a homeowner association.

another matter. That would be an ‘other-regarding act’, a use of private property which harms others and thus can legitimately be regulated. However, a goldfish, a cat that never leaves the house, or even a labrador who lies comatose on the sofa all day, is a use of one’s property that has no effect on the neighbours and is thus not a subject of legitimate regulation. As a tenant, it would be a use of property that affects the landlord’s reversion and could rightly be regulated in a lease, but it is not a use of property that affects the apartment next door at all, or the common property in any meaningful way.

To illustrate this point, let us imagine that a local council banned all pets in residential areas on the grounds that as some pets are a nuisance, it is easier and more certain to ban all.<sup>186</sup> This decision would not be tolerated. People would argue that regulation of land use is only justifiable to prevent harm to others, and must not sloppily scoop up harmless behaviour as well. We do not sanction that kind of legislative overreach in the public sphere, so why should strata schemes be any different?<sup>187</sup> If, as Merrill and Smith assert, property cannot survive without a connection to basic morality, or what is widely believed to be ‘right’,<sup>188</sup> strata schemes will not survive, or not without frequent dispute, if they attempt to regulate otherwise unregulated behaviour without justification.

Many by-laws regulate behaviour that blurs the line between self-regarding and other-regarding acts. By-laws regulate blind colour, balcony furniture, building materials, plant types, paint colours, window washing and lawn mowing. Some would argue that these are all other regarding acts because visual uniformity and maintenance increase property values and people’s enjoyment of their neighbourhood. However, it should not be forgotten that in an ordinary residential subdivision, they would be considered self-regarding acts. Also designed to increase property values and resident amenity, but arguably more contentious, are by-laws that prevent the parking of commercial vehicles (ie, trade trucks) at all or where they are visible (ie, a by-law with obvious class implications), by-laws that prevent the erection of all signs without executive committee approval (ie, a by-law with free speech implications),<sup>189</sup> by-laws that

186 This was the argument accepted by the Adjudicator in *Beattie Place South* [2009] QBCCMCmr 27 (*‘Beattie’*) to justify a blanket ban on pets. See also *Pivotal Point Residential* [2008] QBCCMCmr 55 (*‘Pivotal’*).

187 In recent Qld cases, applicants have sought to argue that blanket pet bans are invalid under the legislation as ‘unreasonable or oppressive’. The *BCCMA* sch 5 cl 20 gives an adjudicator power to remove a by-law that having regard to the interests of all owners and occupiers of lots is oppressive or unreasonable contrary to s 91(3). See *Pivotal* [2008] QBCCMCmr 55 (in which the Adjudicator declined to rule on the issue); *Beattie* [2009] QBCCMCmr 27 (in which the Adjudicator held that the by-law was not unreasonable or oppressive as it provided certainty). In a new development in the law, it was held in Tribunal in *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47 (Member Barlow) that a blanket ban on pets did not amount to ‘regulation’ and was thus invalid.

188 Merrill and Smith, ‘The Morality of Property’, above n 26.

189 The free speech implications of sign bans has been the subject of litigation in the United States in *Committee for a Better Twin Rivers v Twin Rivers Homeowners’ Association*, 929 A 2d 1060 (NJ, 2007).

ban children playing on common property lawns<sup>190</sup> (ie, a by-law with implications for children's health and wellbeing) and by-laws which require residents to be 'dressed appropriately' when on common property<sup>191</sup> (ie, a by-law with serious implications for personal autonomy). When considering such by-laws, we might remember Singer's claim that the 'mix of [property] entitlements and obligations we can legitimately claim depends on the kinds of human relationships we can defend, nothing more and nothing less'.<sup>192</sup> Also, that property law 'can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society'.<sup>193</sup> Does a by-law that prevents a tradesman parking his truck outside his house because it supposedly lowers the neighbours' property values, create 'ennobling and liberating' relationships between neighbours, or does it tend towards the 'exploitative and humiliating'?

Like all property rules, these by-laws do not only affect individuals regulated by them. As we saw in Part II, property cannot be analysed exclusively on a private contractarian basis; that is, if people choose particular property relationships (eg, racially discriminatory),<sup>194</sup> who are we to say otherwise? That is because property rules multiplied thousands of times, through time and across a physical landscape, and created entire social and political regimes; private property law has a public manifestation. The legal rules we choose have 'deep and lasting effects on our social world. ... If property shapes social relations, we need to ask ourselves: "In which world would we rather live?"'<sup>195</sup> Do we want to live in a world where private citizens have the power to regulate the behaviour of others that does not harm them? Do we want to live in a community where people's intolerance of occasionally having to share a lift with a dog or hearing children play is given legal legitimacy?<sup>196</sup> Or a world where an executive

190 See *The Owners of 111 The Broadview Landsdale – Survey Strata Plan 38894 and Colavecchio* [2004] WASTR 15 ('*Colavecchio*'), discussed in Sherry, 'The Legal Fundamentals', above n 2.

191 For example, by-law 9.6 in the Community Management Statement ('CMS') for Liberty Grove (DP270137), in Sydney's west, purports to make the *Liberty Grove Community Policies Handbook* binding on all proprietors in the same way as the CMS. It is likely that this by-law is invalid, being contrary to the *SSMA* s 43(4) and *SSFDA*, however, the *Handbook* attempts to require people on community property to be dressed appropriately at all times: *Liberty Grove Community Policies Handbook* (12 May 2011) Liberty Grove 7 <<http://www.libertygrove.net.au/policies>>; <<https://docs.google.com/viewer?a=v&pid=sites&srcid=bGliZXJ0eWdyb3ZlLm5ldC5hdXxob21lfGd4OjdjOThmYzhmYjgxZTljODg>>.

192 Singer, *Entitlement*, above n 24, 216.

193 Alexander et al, above n 28, 744.

194 Of course, racially discriminatory by-laws are invalid in NSW: *SSMA* s 43(4); *CLDA* sch 3 cl 5(c); *Racial Discrimination Act* 1975 (Cth) s 12.

195 Singer, *Entitlement*, above n 24, 137–8. See also Singer, *The Edges of the Field*, above n 21, 20.

196 In *Ephraim Island – Subsidiary 105*, lot owners who supported the body corporate's rejection of the applicant's request to keep their golden retriever, said 'we most definitely would not have purchased if we had known there was the possibility of sharing the elevator with a large dog': [2007] QBCCMCmr 205 (emphasis altered). The applicant in *Colavecchio* [2004] WASTR 15 (Referee Kronberger) at [32.2] said that he had been:

committee or estate manager can prevent the posting of political signs during elections or order a teenage girl from a community park because her skirt is too short? Do we want to create groups of people or generations of children who take this level of control over others, and by others, for granted? In our quest for denser cities and affordable housing, did we really mean to lose part of our liberal democracy along the way?

Of course the answers are no, we did not mean to; but we arguably have, because the legislature and courts have taken an unrealistically simplistic approach to by-laws. The current stance is that if a community or developer wants a particular by-law, it can have it, as long as it has some connection to lots or common property.<sup>197</sup> Superficially, this might seem neat and easy, avoiding the messy questions raised above, but in reality it does not. Those questions are still there (eg, can a developer impose financially burdensome contracts on ultimate lot owners or can the collective determine how residents dress?), but they have been given a blanket affirmative answer without any engagement with the content of the questions or the consequences of the answers. As four of the United States' leading property professors remind us, 'property implicates plural and incommensurable values' and '[c]hoices about property entitlements are *unavoidable*'; 'rational choice remains possible', but only 'through reasoned deliberation'.<sup>198</sup> In other words, we cannot escape those messy discussions about what should and should not be property entitlements. We need to have them in communities and in the courts. 'Property law [both legislative and case law] should establish the framework for a kind of social life appropriate to a free and democratic society.'<sup>199</sup> In other words, the legislature must not give private

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plagued with the bouncing of basketballs, shouting and screaming from the tenants [sic] offspring and their visitors, along with the playing of tennis on and around our grassed areas, resulting to damaged trees and plants. ... Both my wife and I the owners of 17 Kingsdene Mews neither want or need to see unsightly basketball hoops in our complex, nor hear loud music occasionally.

In contrast, an opponent of the application stated at [39(b)] that:

[i]t is my belief and understanding that Kingsdene Mews was built and designed as small family homes for a young growing Landsdale community. It is therefore reasonable to suggest that families with young children would likely reside within the Kingsdene Mews strata group and *therefore* play within the area. ... It would be unreasonable to expect children not to play in and around their home. The road within Kingsdene is not a through road and therefore generally only receives vehicles belonging to the tenants or visitors. The lots within Kingsdene are very small and therefore the Common ground within Kingsdene is going to be used as a play area for those that have children. It would be unreasonable to think that during those times of play, children's balls etc would not go outside the common area and onto the road or garden for example. One would be naïve to think that this wouldn't happen. One would also be naïve to think that there wouldn't be some noise associated with children's healthy play.

197 *SSMA* s 157 gives an adjudicator power to revoke, repeal or revive a by-law if he or she 'considers that, having regard to the interest of all owners of lots in a strata scheme in the use and enjoyment of their lots or the common property, an amendment or repeal of a by-law or addition of a new by-law should not have been made or effected by the owners corporation.' However there is no guidance in the section as to what might not be in the interests of all lot owners. There is certainly no power to remove by-laws that are not in the interests of the wider community.

198 Alexander et al, above n 28, 743–4 (emphasis added).

199 *Ibid* 744.

citizens carte blanche to write any by-laws they please, but for the sake of individuals within schemes and the wider community, it must explicitly provide courts with the ability to reject by-laws that do not embody the values of a liberal democratic society with a free land market.<sup>200</sup>

## VII CONCLUSION

Strata and community title are here to stay. The relentless growth of cities worldwide has continued unabated for two centuries,<sup>201</sup> and in Australia, this necessitates workable high density freehold land titles. However, when using legislation to create novel forms of property which accommodate high density development, we must be conscious of the ways in which we are straying from orthodox rules of property and the consequences of that divergence.

First, we need to remember that property rules are more than individual entitlement. Private property law both embodies and helps to construct public values. Further, property law has been doing this for centuries and as a result, orthodox rules of property are not mindless, archaic technicality, but rather the distillation of centuries of legislative and judicial consideration of land markets and social relations. Property law played a central role in the creation of democratic societies with capitalist land markets.

Property law did this with the consistent application of ‘boundary rules’; rules that prevent too many people having rights of veto over a single piece of land so that property cannot be chopped into too many, economically and/or socially unusable fragments. The *numerus clausus* principle prevents private citizens dreaming up any property entitlements they desire, which in turn prevents predecessors in title from determining land use in the future. Subject to justifiable public regulation, current owners are largely free to use their land as they please, enjoying significant economic and social freedom. As Heller argues,

[t]he pervasive presence of boundary rules challenges legal and economic theories that suggest unstructured fluidity to private property. Instead, the overwhelming evidence suggests that the notion of an open-ended bundle of property rights is wrong.<sup>202</sup>

As the law currently stands, strata and community title by-laws create ‘an open-ended bundle of property rights’. They do this by allowing private citizens to attach negative and *positive* obligations to freehold land in the form of by-

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200 As noted above n 147, in the United States, the ‘touch and concern’ doctrine has always given courts the power to strike down harmful servitudes. This has been replaced or supplemented by *Restatement (Third) of Property (Servitudes)* (2000) §§ 3.1, 3.4–3.7, with a prohibition on servitudes that are illegal; unconstitutional; against public policy; unconscionable; or impose unreasonable restraints on alienation or undue restraints on trade. Further, United States case law has also consistently applied the principle that rules of homeowner associations and condominiums be ‘reasonable’: *Hidden Harbour Estates v Norman*, 309 So 2d 180 (D Fla, 1975). See Alexander, ‘The Publicness of Private Land Use Controls’, above n 17.

201 Kingsley Davis, ‘The Urbanization of the Human Population’ (1965) 213(3) *Scientific American* 40.

202 Heller, ‘The Boundaries of Private Property’, above n 56, 1192.

laws, with the only general limit being that by-laws relate to the use or enjoyment of lots or common property. As we saw above, by-laws regulating personal autonomy or authorising financially burdensome contracts will all meet that description.

The result of this divergence from boundary rules is twofold. First, the economic consequence is that with too many owners with rights of veto, land will become an anticommons. Some eco-communities and strata tourism are already providing us with visceral examples of dysfunctional, underused and/or unsaleable land. As more and more land is subdivided with strata and community title, this has serious implications for our public free functioning land markets. Second, by failing to constrain by-law making power with the principle of negative liberty, strata and community title schemes can create social and political cultures that run counter to mainstream democracy. When multiplied thousands of times, through time and across the physical landscape of our cities, highly regulated schemes will present a real challenge to property owners' and residents' experience of the freedoms ordinarily associated with liberal democracy, and may compromise their very understanding of those freedoms. When thinking about strata and community title law, like all private property law, we must consistently ask ourselves, '[i]n which world would we rather live?'<sup>203</sup>

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203 Singer, *Entitlement*, above n 24, 137–8.