Strata and Community Title in Australia for the 21st Century 2011 Conference

A bigger strata footprint: are we aware of the implications?

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"I am not young enough to know everything" *Oscar Wilde*

Introduction

When I tell people that I research strata title, the usual response is for their eyes to glaze over while searching for the nearest exit. However, if they are too well-brought up to make a run for it and I have a chance to explain what interests me about strata, their eyes generally re-focus and they start to pay attention. After few minutes, most people say, with undisguised surprise, "Wow, that's actually really interesting". And I am pretty sure they are not just being polite.

This is because strata and community title *are* interesting. They raise fundamental and complex questions about the things that matter to us most in life. Questions about our homes and businesses, about social and neighbourly relations; questions about individual autonomy and freedom; questions about community and society, our immediate physical environment and the wider landscape of our cities; questions about big government and small; questions about capitalism and democracy. Those who are engaged in the day to day practice of strata are amply aware of the complexities of strata title development and living, but undoubtedly do not have time to mull over their historical, socio-political and legal causes. Today, I want to take 40 minutes to talk and think about those issues for us to better understand why the area we work in is so complex, why that complexity will never go away and why consequently, we should be circumspect when extending the strata footprint.

Why Property Matters

My starting point for strata and community title is a recognition that property is important. Despite my undergraduate students' assumptions that property law will be as dull and dry as a university-sanctioned lobotomy, they discover that property is in fact the very stuff of life itself. There is a

reason the catch-cry of the English middle classes during the Glorious Revolution[1] of 1688, the birthday of the democracy under which we all now thrive, was "Life, liberty *and property*". That is because after one's life and freedom, it is property that matters most. Without property, life and freedom have arguably little value at all. In the words of two great property theorists, first, "without some minimal appropriation – without some minimal taking of the resources necessary to sustain life – we will die"[2] and second, "everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it."[3] While it is easy to lose sight of these truisms in an affluent democracy, 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 also the places that we are free to be ourselves, to live out the life we chose to lead. As Joseph Singer, Professor of property law at Harvard University says,

> 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.[4]

The purpose of this drilling down to the very basic functions of property is not to state the obvious, but to remind ourselves what property means to people and consequently why it matters so much. Why are conflicts in some strata schemes so intense and personal? Why do management rights generate so much debate? How can just 145 schemes in Queensland produce 20% of the Office of the

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[1] The Glorious Revolution was the bloodless revolution in which the English Parliament finally secured supremacy over the King. The King could no longer call or disband Parliament at his discretion, raise new taxes, or use prerogative courts to avoid the common law courts which were so important to private property rights: Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Constitutional Governing Public Choice in Seventeenth-Century England", (1989) 49(4) *The Journal of Economic History* 803.

[2] Laura Underkuffler-Freund, "Property: A Special Right" (1996) 71 *Notre Dame Law Review* 1033, pp1039-1040.

[3] J Waldon, "Homelessness and the Issue of Freedom", 39 (1991) *UCLA Law Review* 295, p296. This comment was made in the context of a discussion of homelessness, in which Waldron points out that if all property were privatised, homeless people would literally have nowhere they could perform basic necessities such as washing and urinating. The privatisation of all property and exclusion of non-owners from it would in effect make urinating and washing illegal for homeless people.

[4] Joseph W Singer, *The Edges of the Field: Lessons on the Obligations of Ownership*, (Beacon Press, Boston, 2000), p27.

Commissioner for Body Corporate and Community Management's work?[5] Why do the conference organisers have a separate forum specifically for the owners of strata properties? Because property matters: to our lives, our livelihoods, our well-being, our freedom, our very existence. When we talk about strata and community title, when we transact in relation to it and in particular, when we legislate for it, we must remember that we are not dealing with "market product" like iPads or shares, we are dealing with the bedrock of people's lives.

Why Property Law Matters

Property law has always recognised that property is fundamental to human existence and thus provided, as an alternative to a big stick, a means of protecting it. However, property law is not carved into stone tablets, handed down from on high. It is created *by* people *for* people, which means that it can and does change. As most property theorists acknowledge, there is no "inevitable content" to property. We need to argue for what is in and what is out of protected property rights, the test being whether rights amount to "justificatory practice".[6] Again, this might seem to be stating the obvious, but it is a fact that seems to me to be overlooked in strata title repeatedly. For example, just because a body corporate is currently a separate legal entity that a developer can cause to enter into a contractual relationship with a management company or other service provider, does not mean that this is right, necessary or inevitable. If an aspect of property law produces outcomes that we collectively consider to be undesirable, it can, should, and most probably eventually will be changed.

This is not because of the modern phenomena of consumer protection legislation or the allegedly intrusive "nanny state", it is because property law has always performed the function of delineating acceptable social and economic relations. Property law does this for two reasons. First, 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 sanctions

[5] L Toohey and D Toohey, "Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach" (May 14, 2010), University of Queensland TC Beirne School of Law Research Paper No. 10-11. Available at SSRN: http://ssrn.com/abstract=1607544, p10.

[6] H Dagan, "The Limited Autonomy of Private Law", (2008) 56 *American Journal or Comparative Law* 809, pp 814-815.

legitimate human behaviour and penalizes illegitimate behaviour. Ideally, "property institutions both construct and reflect the ideal ways in which people interact in a given category of social contexts (e.g., market, community, family) and with respect to a given category of resources (e.g., land, copyright, patents)."[7] However, law does not simply operate on a micro level of individual entitlements. 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.[8] Every time we make a choice about a legal rule, we are making a choice about the kind of relations we want and thus, the kind of society in which we live. Property is not just an aggregation of individual entitlements; it is a regime.[9] As Professor Joseph Singer argues, "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?"[10]

Let me give an example of how property rules operating between individuals combine to create a social and political system. In 1917 the United States Supreme Court ruled in *Buchanan v Warley* 245 US 60 (1917) that it was unconstitutional for municipalities to racially segregate housing through zoning laws. In response, real estate 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 these covenants is that rational individuals negotiate agreements that maximise the economic value of their land. The restriction, by definition must increase the value of the land or the parties would not agree to it.[11] Racially restrictive covenants were

[7] Dagan, "The Limited Autonomy of Private Law", above note 6, p 815.

[8] Joseph W Singer, *Entitlement: The Paradoxes of Property*, (Yale University Press, New Haven, 2000); Singer, *The Edges of the Field*, above note 4; Dagan, "The Limited Autonomy of Private Law", above note 6.

[9] Singer, *Entitlement*, above note 8, p143.

[10] Singer, *Entitlement*, above note 8, pp137-138. See also, Singer, *The Edges of the Field*, above note 4, p20.

[11] R Epstein, "Notice and freedom of contract in the law of servitudes", (1981-1982) 55 *California Law Review* 1353. For a full discussion of covenants, see below.

taken up enthusiastically by the US real estate industry and even the Federal Housing Authority (FHA), which insured residential mortgages against loss. In its *Underwriting Manual* for staff, the FHA recommended that restrictions should include "prohibition of the occupancy of properties except by the race for which they are intended."[12] 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.[13]

Racially restrictive covenants were finally outlawed by the Supreme Court in 1948 in *Shelley v Kraemer* 334 U.S. 1,[14] but not before irreparable damage had been done to millions of individual African and Chinese Americans, American society and its cities. One example will suffice.

The United States has struggle for decades with the problem of racially segregated schools. Despite the landmark Supreme Court decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) 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 in American planning. 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.[15] Governments and courts have spent much money and time trying to combat the problem.[16] For example, in the 1970s, court-ordered bussing programs moved

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[12] E McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, 1994), p65.

[13] McKenzie, *Privatopia*,above note 12, pp70-71.

[14] Ironcially, the Supreme Court held that a racially restrictive covenant was valid between the parties but that court enforcement would amount to discriminatory state action prohibited by the Fourteenth Amendment. The equal protection clause in the Fourteenth Amendment to the United States' Constitution provides that no state shall deny persons within its jurisdiction equal protection of the law.

[15] The problem is exacerbated by the fact that many public schools in the United States are funded by local property taxes.

[16] G Orfield and C Lee, *Why Segregation Matters: Poverty and Educational Inequality*, (Civil Rights Project, Harvard University, 2005). The Civil Rights Project, originally at Harvard University and now at UCLA, 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.

white children into predominantly black schools and vice versa.[17] Bussing was widely criticised, allegedly leading to "white flight" into the private schools that mushroomed in white neighbourhoods, and was eventually abandoned. A workable solution is yet to be found.

So, what remains an endemic, destructive, expensive, community-wide social problem,[18] 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, when multiplied thousands of times through time and across a physical space, create a social and political system, as well as urban landscape, in which we, and future generations must live. As Singer says, above, "If property shapes social relations, we need to ask ourselves: "In which world would we rather live?"[19]

When we structure strata and community title developments, when we write by-laws that will bind land into the future, when we decide if communities will be or even look gated, we are not just creating a "product" for the market place; we are building our democracy. The choices we make are not just important to the individual parties to a transaction, the developer and purchaser, they are important to the entire community and future generations. While the day to day detail of strata and community practice matter to people living and working in schemes, sometimes we need to lift up our eyes from the Smeg appliances and think about the bigger picture.

Lessons from our Forebears

Racially restrictive covenants are an instance in which property law got it wrong. As a general rule, however, property law has got the big issues right. Most of the things that property law allows are beneficial for individuals, society and economies and most of things it disallows are harmful. Property is the oldest area of law and thus its principles have been tried and tested over centuries: in effect, it is one big empirical study that has rolled along for hundreds of years, miraculously without a

[17] S Asher, "Interdistrict remedies for segregated schools" (1979) 79 *Columbia Law Review* 1170.

[18] J Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America*, (Crown Publishers, 2005).

[19] Singer, *Entitlement*, above note 8, pp137-138. See also, Singer, *The Edges of the Field*, above note 4, p20.

Chief Investigator or ARC grant. The study tells us that if property law disallows certain transactions or property relations, it is probably because they do not work; that is, they impose more costs, at an individual and more importantly societal level, than benefits.

For our purposes it is important to recognise that orthodox property law did not allow the kinds of high rise and master planned communities that we build today. [20] Part of that can be put down to the fact that without modern engineering and the curtain wall, property law never needed to think about how to subdivide air into 100 storeys. As a result, we should not read too much into property law's failure to provide workable titles for multi-owned high rise buildings. However, low rise master planned estates have always been physically possible, they have just not been legally so. Why might this be?

The answer is because of modern property law's well-founded antipathy *to the kind of economic and social relations* that are needed for strata and community title development. That antipathy was developed for good reason, during the crucial period in our history in which our law and political system struggled to wrestle control from the hands of absolute monarchs and vest it in democratically elected parliaments.[21] A period of history in which ownership of property 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. *Twentieth century property law both reflects and constitutes fundamental principles of modern democracy and advanced capitalism.* As democracy and capitalism remain the accepted bedrock of our society, we need to think very carefully and act cautiously before we undermine those principles in the twenty-first century.

[20] C 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(1) *Australian Property Law Journal*, 1-23; C Sherry, "The New South Wales strata and Community Titles Acts: A case study of legislatively created high rise and master planned communities" (2009) 1(2) *International Journal of Law in the Built Environment*, 130-142.

[21] North and Weingast, above note 1.

From feudalism to capitalism

In feudal society, ownership of land did not mean what it means to us today. The downfall of the Roman Empire meant the loss of law, order and trade in Western Europe, as well as any sense of security that comes from organised government. In the Dark Ages, from the 5th to the 10th centuries, the only source of protection came from a neighbour "who was strong enough in wealth and influence to provide shelter in time of threat."[22] As a result, people placed their only asset of value, land, in the hands of a stronger neighbour in return for protection and support. That neighbour in turn might place all of his land in the hands of another stronger neighbour again. Thus, ownership of land was not simply a relationship to a piece of earth but a relationship with other individuals to whom the owner owed obligations. With the Norman Conquest in 1066, a feudal system of land ownership was actually or theoretically[23] imposed on all land in England, creating a pyramid of land ownership and obligations with the King at the top. The most important obligation land owners who held directly from the King owed 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.[24] 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. There were social and economic incentives for owners to further fragment title to pass on their obligations to someone below them.[25]

A fundamental part of the development of a capitalist economy was the dismantling of the feudal pyramid and re-aggregation of fragmented interests in land so that individual owners could freely and

[22] P Butt, *Land Law*, (3rd ed, LBC Information Services, Sydney, 1996), p51. I am indebted in this section to Profesor Butt's explanation of the significance of feudalism for land law.

[23] 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, *The History of The Land Law*, (2nd ed, Clarednon Press, Oxford, 1986), pp 3-5; Butt, *Land Law*, above note 22; pp 54-55. This accounted for the almost universal inclusion of land in England within the feudal pyramid.

[24] Butt, *Land Law*, above note 22, pp 63-65.

[25] Simpson, *The History of The Land Law*, above note 23, p5; M Heller, "The Boundaries of Private Property" (1998) 108 *Yale Law Review* 1163, 1171-1172.

thoroughly exploit their resource. From the thirteenth century onwards judges and legislatures[26] promulgated property rules that prevented excessive fragmentation of property rights. The result is a modern system of property that allows some fragmentation – trusts, leases, life estates, easements, profits a prendre, covenants and mortgages – but it is strictly limited. While people are free to dream up just about any contract right they please, the same is not true of property rights. There is a clear limit on permissible interests in land so that people are not able to fragment land title in multiple, novel ways. This limit is created by the *numerous clausus* principle[27] and estates system.[28] In effect, these are the legal equivalent of rural minimum allotment sizes. Parcels of agricultural land that are too small are unproductive; legal titles that are split between too many owners are unusable. A purchaser who knows that title is or might be fragmented, will pay less for it. A limited number of property interests with predictable content promotes the free exchange, investment in and exploitation of land; in other words, it promotes the central elements of capitalism.

Freeing land from the control of feudal overlords went hand in hand with freeing land from family control, in particular what property lawyers call "dead hand control". A feudal system with a monarch at the top is a social and political system rooted in family ties and status by virtue 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 after 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

[26] For example, the Statute of *Quia Emptores* 1290 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: C Harpum, *Megarry and Wade The Law of Real Property*, (Sweet and Maxwell, London, 2000), pp27-30.

[27] Edgeworth translates *numerus clausus* as "closed list", stating that "the principle holds that landowners are not at liberty to customise land rights, in the sense of re-working them in an entirely novel way to suit their individual needs and circumstances. Rather, any new rights must fit within firmly established pigeonholes, of which the law only permits a small and finite number", B Edgeworth "The Numerus Clausus principle in Contemporary Australian Property Law" (2006) 32 *Monash University Law Review* 387, p387; T Merrill and H Smith "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2001) 110 *Yale Law Journal* 1.

[28] There are three estates in English land law, the life estate, fee simple and fee tail. Traditionally, leases were not an estate in land. See P Butt, *Land Law*, (5th edition, Thomson, Sydney, 2006), pp 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.

Downtown Abbey.[29] Fee tails served the social and economic function of protecting family property from dissipation amongst people unrelated by blood. Mr Bennet's and the Earl of Grantham's lands are going to pass to their eldest male relative, regardless of their needs or desires. It goes without saying that their ability to economically exploit their land during their lifetimes was seriously impaired by this form of title.[30] Their land was effectively inalienable because they did not have a fee simple, the only interest worth buying. Courts and individuals waged a war of attrition against fee tails from the 15th century onwards[31] and they were finally abolished by legislatures in the early twentieth century,[32] once it was obvious that they were truly antithetical to the needs of capitalism.

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 who could then fully exploit its potential,[33] one anomaly appeared. The freehold covenant.[34] The freehold covenant is the theoretical foundation of strata and community title.

The economic theory underpinning freehold covenants[35] and of course by-laws, is that as our land is not an island and we are affected by what others do next door, the ability to prevent harmful land-use on adjacent properties is valued by land-owners. Rather than requiring them to buy the entire

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[29] *Downton Abbey* is a contemporary British TV 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.

[30] In essence a fee tail was like a life estates, for example the owner could not grant a lease for longer than his life: Simpson, *The History of The Land Law*, above note 23, pp 90-91.

[31] The purpose of this war of attrition was to defeat the tail, converting the fee tail to a fee simple, a freely alienable estate. Simpson, *The History of The Land Law*, above note 23, p91; Harpum, *Megarry & Wade The Law of Real Property*, above note 26, p73-75.

[32] For example, in New South Wales, fee tails were converted to fee simples by s19 and s19A *Conveyancing Act* 1919. s1 *Law of Property Act* 1925 (UK) allowed only fee simples or terms of years to exist at law.

[33] Singer, *Entitlement*, above note 8, p147.

[34] *Tulk v Moxay* (1848) 2 Ph 774; 41 ER 1143 was the anomolous equity case that first recognised that a purchaser of land could be bound by a covenant purportedly attached to the fee of which he had notice. Freehold covenants are different to leasehold covenants because they are attached to a fee simple interst, which goes on forever. The covenants, like the fee, potentially never die. Leases, even if long, evenutally come to an end and their covenants end with them. As a result of this inbuilt mechanism for leasehold covenants' destruction, courts have been less concerned with the limits they impose on land.

[35] For a discussion of this theory, see Uriel Reichman, "Towards a Unified Concept of Servitudes" (1982) 55 *Southern California law Review* 1177.

possessory interest in the land next door to control that land's use, property law allows people to acquire a smaller, non-possessory interest that will reliably restrict not just what the current neighbour does, but the activities of any subsequent owners. Further, that restriction is created not for the benefit of us personally, but for the benefit of the land itself, thus the restriction can be enforced against the neighbour by whoever owns our land, at any time in the future. This is what land lawyers call "running with the land". It is important to note that freehold covenants were developed in the nineteenth century in the absence of a public planning system that prohibited harmful mixed uses.[36]

The problem with restrictive covenants is that the theory does not always work in practice. What seems like a value-enhancing restriction today may in fact sterilise land tomorrow, radically reducing its worth. Freehold covenants are a form of "dead hand control".[37] Current owners are limited in their ability to exploit their land by decisions made by their long dead, or even immediate predecessors in title. Further, they re-introduce feudal concepts of ownership, whereby the acquisition of land creates a range of obligations owed by the purchaser to third parties. AWB Simpson, who was arguably the greatest modern scholar of the history of land law, 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.[38]

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[36] Philip Booth, *Planning by Consent: the Origins and Nature of British Developmental Control*, Taylor & Francis, London, 2003. Much of the land in English cities was subject to long-term leases, which could function as system of private land-use reguation. 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: J Summerson, *Georgian London*, (Penguin Books, London, 1978); D Cruickshank and N Burton, *Life in the Georgian City*, (Viking, London, New York, 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 reguation. Both these factors contributed to the need for a system of public planning.

[37] Initially, courts refused to enforce freehold covenants at all. In *Keppell v. Bailey* (1834) 2 My. & K. 517, 39 E.R. 1042, 1048 Lord Brougham said, "[I]t 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."

[38] Simpson, *The History of The Land Law*, above note 23, p257.

Uriel Reichman, in an exhaustive review of the United States' law on covenants described covenants as having the potential to create "modern variations of feudal serfdom."[39]

In an effort to prevent the harmful effects of freehold covenants, English courts developed a range of limitations on them,[40] most importantly, that they can only *restrict* land-use, (for example, restricting building materials to brick and tile or land-use to residential), but they cannot impose positive obligations, (for example the payment of money or levies).[41] The inability to impose positive obligations on freehold land in orthodox property law is the central reason we needed legislation to facilitate the detailed master planning in strata and community title schemes.[42] Strata and community title legislation, in particular by-laws, sweep away the limitations in orthodox property law allowing all manner of positive and negative obligations, dreamed up by developers and subsequent owners, to permanently attach to freehold land. In doing so, they sweep away the collective wisdom of centuries of land lawyers who have insisted that the key to a functional capitalist land economy is individual freedom of land use.

Let's look an example that illustrates that the aged land lawyers might have been on to something. Rosneath Farm was a pioneering strata project premised on permaculture and pattern language principles, located in the beautiful south west corner of Western Australia, just north of Margaret River. It is difficult to know anything more than a fraction of the real details from media and reported cases, but it would be safe to suggest that part of the problems on Rosneath Farm were rising property

[39] Reichman, "Towards a Unified Concept of Servitudes" above note 35.

[40] *Haywood v Brunswick Permanent Benefit Building Society* (1881) , 8 QBD 403. For a good, plain language explanation of this history see Victorian Law Reform Comission *Easements and Covenants: Final Report*, 2011.

[41] *Tulk v Moxay* (1848) 2 Ph 774; 41 ER 1143; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (CA) and *Pirie v The Registrar General* (1962) 109 CLR 619; [1965] ALR 860.

[42] United States law created a doctrine of "real covenants" in the nineteenth century that allowed the imposition of positive obligations on freehold land, possibly because of the greater availability of land in the United States and the enthusiasm for entrprenureal ventures. The result of the doctrine of real covenants is that detailed master planning has been possible in the United States, without legislation, for well over a century: Reichman, "Towards a Unified Concept of Servitudes" above note 35; S French "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands" (1981-1982) 55 *California Law Review* 1261; *Neponsit Property Owners' Association Inc v Emigrant Industrial Savings Bank* (1938) 278 NY 248, 259-60, 15 NE 2d 793.

prices in Western Australia.[43] The restrictions and obligations that were imposed on the rural land by the original strata plan of subdivision had initially increased the value of the land by making it desirable to a pool of ecologically-minded purchasers. Unfortunately, when changes in the economy increased the value of the land to a wider pool of potential purchasers, the by-laws were no longer economically viable. Only a small proportion of people would be prepared to accept an interest in land burdened by an obligation to attend a permaculture course, to only build and use land in accordance with permaculture and pattern language principles, to allow their pets to be trapped and removed if caught out at night or to provide a house key to the body corporate.[44] In short, the by-laws made the land almost unsaleable. While strata provides an in-built mechanism for the change or removal of by-laws this is not easily done. A special majority or unanimous vote is generally required, effectively entrenching many by-laws in perpetuity.[45] 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 remove them.[46] Eventually a settlement was reached and most of the land was re-subdivided as ordinary rural residential land, but only after a lot of time and money were wasted.

Rosneath Farm is not used as an illustration of the folly of eco-communities. In a plural democracy, law should facilitate the formation of voluntary sub-communities with values that differ from the mainstream.[47] Strata and community title are an effective tool in these projects.[48] Rosneath Farm is

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[43] RBennett, "Eco-village soon but a memory", *Busselton Dunsborough Mail*, 13 Feb, 2008, http://www.busseltonmail.com.au/news/local/news/general/ecovillage-soon-but-a-memory/282710.aspx, accessed 25 July 2011.

[44] *Grant and The Owners of Rosneath Farm - Strata Plan 35452* [2006] WASAT 162

[45] Of course permanence is the whole point of by-laws. They would not effectively regulate land if they could be easily removed. In New South Wales, by-laws generally require a special resolution to be altered, (s47 SSMA; s14 *Communinity Land Management Act* 1989 (CLMA)), however by-laws controlling the "essence" or "theme" of a community scheme can only be altered by unanimous resolution: s17(2) CLMA). See also s 128(2) of the *Unit Titles Act* 2001 (ACT); s 19(2) of the *Strata Titles Act* 1988 (SA); s 42(2) of the *Strata Titles Act* 1985 (WA); s 96 of the *Owners Corporation Act* 2006 (Vic). However, for by-laws controlling the 'essence' or 'theme' of a community scheme requiring unanimous resolution for alteration: see eg s 17(2) CLMA; s 21(1) of the *Unit Titles Schemes Act* 2009 (NT). In Queensland, these scheme statements can be altered by special resolution: s 62 of the *Body Corporate and Community Management* Act 1997 (Qld).

[46] *Grant and The Owners of Rosneath Farm - Strata Plan 35452* [2006] WASAT 162 was an attempt to attack the validity of many of the by-laws, however the Tribunal upheld most.

[47] How far we go in doing this is an extremely difficult question that cannot be addressed here. See R Ellickson, 'Cities and Homeowner Associations' (1982) 130 *Uni of Pennsylvania L Rev* 1519; G Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Group Autonomy' (1989-1990) 75 *Cornell L Rev* 1; N Stolzenberg, "The

used simply as warning against the trigger-happy writing of by-laws and creation of unnecessary horizontal community title subdivisions. Owing to their density, by-laws and common property in high rise building are unavoidable, however in low-rise subdivisions, by-laws and common property are optional. They are used on the theory that they enhance land value, but as we have just seen, this is not always the case.

Michael Heller has labelled the contemporary phenomenon of excessively restricted land the "tragedy of the *anticommons*".[49] 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.[50] 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".[51] Heller's initial research looked at new property rights in post-communist Russia which failed to function properly because too many people had powers of veto in relation to individual parcels of land, (for example, multiple government departments, local councils, multiple occupiers).[52] However Heller later turned his attention to US property law and not surprisingly identified common interest communities (CICs), US strata and community title developments, as similar offenders.[53] He says that "like the medieval fee tail, the modern CIC forms may give people too much power to lock resources

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Return of the Repressed: Illiberal Groups in a Liberal State", (2001-2002) 12 *Journal of Contemporary Legal Issues* 897.

[48] A number of communes or intentional communities in Byron Shire Council in northern New South Wales have recently converted from Multiple Occupancies to community title: http://www.byron.nsw.gov.au/multiple-occupancies-to-community-title.

[49] M Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1997) 111 *Harvard Law Review* 622; Heller, "The Boundaries of Private Property" above note 25.

[50] G Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243.

[51] Heller, 'The Tragedy of the Anticommons", above note 49, p624.

[52] Heller, 'The Tragedy of the Anticommons", above note 49.

[53] Heller, "The Boundaries of Private Property" above note 25; M Heller, "Common Interest Developments at the Crossroads of Legal Theory" (2005) 37(3) *The Urban Lawyer* 229.

into low-value uses."[54] It is hard not to think of strata tourist developments in this context as well. Instead of having a single tourist operator who controls land-use and the business, control and powers of veto are split between multiple lot owners, the management company, as well as other service providers by virtue of contracts binding the body corporate. From the perspective of reported litigation,[55] these developments look suspiciously like anticommonses; that is, a limited resource with too many owners of different property rights with different motivations, exercising powers of veto over use.

Given the risk of the tragedy of the anticommons we need to think very seriously about the growing tendency to lock up large amounts of land in residential, horizontal community title schemes.[56] This warning is directed specifically to councils and state governments whose preference for community title usually stems from the fact that they can pass on infrastructure costs to the private sector who in turn pass it on to purchasers. This is potentially a short-term gain at long-term cost. When you privatise large tracts of bushlands, wetlands, parks, roads, sporting fields and waterfronts by splitting beneficial title between hundreds of owners of common property, giving each a significant power of veto over land use, it is more or less guaranteed that land-use will be frozen in time. If then, (for other possibly sensible reasons), you prevent the collective owners from engaging in any commercial activity on the commonly-owned land, you have effectively economically sterilized it. If on top of that, you limit the pool of purchasers for individual lots to people who are prepared to accept a myriad of restrictions on their title and use, and bung in a private sewerage treatment plant that no-one has the expertise to manage, you have one big, very economically hobbled piece of land. If community title is used consistently as a matter of local or state government policy as it has been in California and

[54] Heller, "The Boundaries of Private Property", above note 25, p1184.

[55] *Waldorf Apartment Hotel, The Entrance Pty Ltd v Owners Corp SP 71623* [2010] NSWCA 226; *Santai v The Owners - Strata Plan No. 77971* [2010] NSWSC 628, partially overturned on appeal in *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* [2011] NSWCA 159.

[56] This warning does not relate to high rise development. Without stratat title, valuable airspace would be unused or underused owning to a lack of secure title. Company title allows for the subdivision of airspace, but as it does not grant a Torrens title to land (air), it is less marketable and less mortgageable; that is, less able to be economically exploited.

Arizona, where in large parts of these states there is no alternative form of title,[57] we will end up sterilizing or at least radically reducing the economic potential of significant areas of land.[58]

Finally, reversing these effects may be almost impossible. One of Heller's most important arguments is that fragmentation "may operate as a one-way rachet: Because of high transaction costs, strategic behaviours, and cognitive biases, people may find it easier to divide property than to recombine it."[59] This is what we saw at Rosneath Farm. Although the legislation provides a voting mechanism to removed restrictions and obligations on title, in practice they are hard to galvanise, requiring special majorities or unanimous votes. If you want to remove the restrictions altogether and re-aggregate ownership of common property, you must terminate the scheme. If termination of old, dilapidated strata schemes has thus far defeated us, [60] how will we terminate five hundred lot community schemes? The only answer is compulsory acquisition by the state, one of the most contentious issues in property law, particularly if it requires the taking of land from one private citizen for transfer to another for the purposes of private development.[61] Before we continue down the track of uncritical community title subdivision, we should heed Michael Heller's warning:

> The pervasive presence of boundary rules [that is, rules that limit the kinds and number of interests private citizens can create in land], challenges legal and economic theories that suggest unstructured fluidity to private property. Instead, the overwhelming evidence suggests

[57] McKenzie, *Privatopia*,above note 12.

[58] One partial solution to this problem is ensuring that public planning provisions override private planning instruments. For example, in New South Wales s28 of the *Environmental Planning and Assessment Act* 1979 (NSW) states that "For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument." A "regulatory instrument" is defined to include a by-law or restrictive covenant. The provision attempts to tackle the inherent problem of private planning raised by Simpson, above note 38.

[59] Heller, "The Boundaries of Private Property" above note 25, pp1165-1166.

[60] Sherry, C. (2006) "Termination of strata schemes in New South Wales — Proposals for reform" *Australian Property Law Journal*, vol.13, no3 pp 227-239.

[61] Gray, K. "There's no place like home", (2007) 11(1) *Journal of South Pacific Law* 73; Michael Taggart, "Expropriation, Public Purpose and the Constitution" in C.Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, (Clarendon, Oxford 1998); *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20; *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* [2009] HCA 12.

> that the notion of an open-ended bundle of property rights [eg land with almost unlimited by-laws] is wrong.[62]

In other words, we dismiss the wisdom of centuries of property law at our peril.

From feudalism to democracy

Property law did not pursue an agenda of radical economic reform in a political or social vacuum. The centuries that saw property freed from the shackles of feudalism, were also the centuries in which our political democracy was born. At the risk of stating the obvious again, democracy, like capitalism, is a set of values that is yet to be seriously challenged in the West.

One of the most fundamental tenets of democracy is negative liberty. While we have consented to be governed and given up some of our individual liberty for that purpose, there are strict limits on how far government can infringe our liberty. The principle of negative liberty is that we are free to do as we please so long as we do not harm others. In property law, this translates into the principle that we are free to use our property as we please, so long as the way we use it does not interfere with or harm other people, (the "harm principle" [63]). The concept has a long political and philosophical pedigree in Western thought, from Hobbes[64] and Locke,[65] through to John Stuart Mill[66] and Isaiah Berlin.[67] While

[62] Heller, "The Boundaries of Private Property" above note 25, p1192.

[63] The classic enounciation of this principle is in *On Liberty*, in which John Stuart Mill stated that, "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that 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." (emphasis added), Chapter 1, Introductory, cited at http://www.bartleby.com/130/1.html.

[64] Thomas Hobbes, *Leviathan,* (1651), reprinted in *On Sovereignty*, (The Collector's Library of Essential Thinkers, London, 2005).

[65] John Locke, *Second Treatise of Government*, (1670), reprinted in *On Sovereignty*, (The Collector's Library of Essential Thinkers, London, 2005).

[66] John Stuart Mill, *On Liberty*, 1869, available on line at http://www.bartleby.com/130/

[67] Isaiah Berlin, "Two Concepts of Liberty", in Henry Hardy, (ed), *Liberty*, (Oxford University Press, Oxford, 2002), pp167-217.

it has its critics, most notably Marx, most contemporary critics do not assert that is it wrong because we *should* be needlessly interfered with by the government and our neighbours, rather they suggest that on its own, it insufficient for universal human flourishing.[68] Regardless of wider academic debates, the concept of negative liberty is ingrained in modern property law. For example, the genesis of modern planning regimes, which dominate so much property practice today, was the nineteenth century medical discovery that disease, in particular cholera, was water-borne.[69] Once it was discovered that dumping raw sewage in your own backyard could kill your neighbours when it leeched into the water supply, the harm principle of western liberalism justified restrictions on property owners' freedom to do as they pleased on their land. Beneath all of the legislative complexity and form-filling, the harm principle remains the ideological justification for planning law today.

The concept of negative liberty is not simply ingrained in our property law, in western democracies, it is ingrained in our very psyches. While people may have never read or even heard of Locke or John Stuart Mill, the idea that we are free to do as we please so long as we do not harm others, probably seems pretty obvious to many people here. As an integral part of our democratic culture, it is axiomatic to us, and more importantly, to purchasers in strata schemes. They become owners of strata

[68] It is impossible in this context to do any justice to the extensive scholarship critiqing classical liberalism. The concept of negative liberty has been rightly challenged as insufficient by Charles Taylor, John Rawls, Amartya Sen and Marth Nussbaum, to name a few. Taylor, for example asks, would we 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? C Talyor, 'What's Wrong with Negative Liberty,' in A. Ryan (ed.), *The Idea of Freedom*, (Oxford University Press, Oxford, 1979), pp 175-93. Sen and Nussbaum have focussed on "capabilities" and the fact that without the government intervention and social assistance, negative liberty simply means that many people will be free to starve. For a general account of critiques of liberalism and references see, "Liberalism", The Standford Enclycolpedia of Philopsphy, available at http://plato.stanford.edu/entries/liberalism/. For more specific legal critiques of negative liberty, see for example, Cass R.Sunstein, "Legal Interference with Private Preferences", (1986) 53(4) *University of Chicago Law Review* 1129.

[69] P Booth, *Planning by Consent: the Origins and Nature of British Developmental Control*, (Taylor & Francis, London, 2003). Dr John Snow, along with other nineteenth century medical practitioners, suspected that cholera was spread through drinking water contaminated by raw sewage. During the 1853-4 epidemic he was able to test this theory by persuading authorities to remove the handle from a pump in Broad Street, London, which drew water from downstream in the Thames, as opposed to cleaner sources upstream. The removal of the handle immediately halted the spread of cholera in houses around the pump: Howard Brody, Michael Russell Rip, Peter Vinten-Johansen, Nigel Paneth, Stephen Rachman, "Map-making and myth-making in Broad Street: the London cholera epidemic, 1854", (2000) 356 *The Lancet* 64.

property with certain expectations in place, many of which are *entirely legitimate*. When those expectations are flouted, frustration and dispute will result.[70]

So how might strata and community title offend the principle of negative liberty? Through by-laws. Not any by-laws, because the idea that we can be regulated in the use of our property to prevent us harming others is integral to liberalism. What offends the principle of negative liberty are by-laws that seek to regulate autonomous, or what property theorists would call "self regarding" acts. Self-regarding acts can be divided into two categories. The first category is actions that do not harm or affect others at all and the second, actions that might affect others but not in legally relevant ways.[71] By legally relevant, I mean actions that property law would not traditionally step in to prevent and which as a result, as citizens of a diverse, plural and invariably urban democracy, we are expected to tolerate.

There are significant differences between state legislation on the ambit of by-laws, but New South Wales legislation will be used to illustrate the point, partly because it is the legislation with which I am most familiar, and conveniently because it is arguably the worst offender. In New South Wales, strata title by-laws can be made for "the control, management, administration, use or enjoyment of the lots or the lots and common property".[72] With the exception of by-laws that restrict transfer, leasing, mortgaging, children and guide dogs,[73] courts have repeatedly confirmed that the ambit of valid strata

[70] Empirical research suggests that people's preconceived idea of the meaning of property affects their restistance to regulation. J Nash and S 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 US property law, though not lay understanding, for the past century). People's resistance to regulation is also lessened if they are forewarned of the possibilty 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 flouting people's preconceived ideas of what property ownership means leads to dispute: J Nash and S Stern "Property Frames" (2010) 87(3) *Washington University Law Review* 449.

[71] J Singer, "How property norms construct the externalities of ownership", in G Alexander and E Penalver, (eds), *Property and Community*, (Oxford University Press, Oxford, 2010).

[72] s47 of the *Strata Schemes Management Act* 1996 (NSW) (SSMA); s 169 of the *Body Corporate and Community Managemanet Act* 1997 (Qld); s 19 of the *Strata Titles Act* 1988 (SA); s 138 of the *Owners Corporation Act* 2006 (Vic); s 42 of the *Strata Titles Act* 1985 (WA); s 95 of the *Unit Title Schmes Act* 2009 (NT); s 128 of the *Unit Titles Act* 2001 (ACT); s 90 of the *Strata Titles Act* 1998 (Tas).

[73] s49 of the *Strata Schemes Management Act* 1996 (NSW)

by-laws is very wide.[74] Community title management statements (the equivalent of strata by-laws) are similarly broad, with schedule 3 of the *Community Land Management Act* 1989 (NSW) containing a list of matters that can be included in a management statement, such as laundry, pets, unacceptable noise, architectural and landscaping guidelines, but specifically stating that these do not limit what might be included in a statement. Schedule 3 provides some limits by stipulating that provisions that affect disability assistance animals, those that would exclude public housing or those based on 'race or creed, or on ethnic or socio-economic grouping' are prohibited.

New South Wales does not have a general provision invalidating by-laws that are unreasonable, oppressive or discriminatory.[75] Of course they cannot be contrary to state or Federal discrimination legislation,[76] but is clearly permissible to use by-laws to regulate behaviour within people's own homes, even if their behaviour does not harm others. Prima facie, a by law prohibiting people eating meat in their homes would be valid,[77] as would a by-law prohibiting internal pink paint. According to *White v Betalli*,[78] a by-law permitting others to use part of another owner's lot is also valid.[79] All of these by-laws are clearly for the "use or enjoyment" of a lot. In Western Australia a by-law requiring all owners to provide the body corporate with a key to their house has been held to be valid.[80]

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[74] *White v Betalli & Anor* [2007] NSWCA 243; *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* [2011] NSWCA 159.

[75] In theory as delegated legislation, by-laws must not be unreasonable or oppressive, (*Lynch Glenn and Jenny owners of lot 75a. v* [1999] NSWSSB 55 (17 August 1999)), but this has rarely been referred to by courts. There was a passing reference to it in *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* [2011] NSWCA 159, but no consideration or application of the principle. See also, s 180(7) of the *Body Corporate and Community Managemanet Act* 1997 (Qld); s 91(3) of the *Strata Titles Act* 1998 (Tas); s140 of the *Owners Corporation Act* 2006 (Vic).

[76] A by-law has no force or effect to the extent that it is inconsistent with the *SSMA* or any other Act or law: s43(4) *SSMA.*

[77] If the scheme were an eco-scheme, developed by like-minded vegetarians, such a by-law would arguably be appropriate for that kind of scheme. The nature of the scheme was determinative of the validity of a boat storage by-law in *White v Betalli & Anor* [2007] NSWCA 243.

[78] *White v Betalli & Anor* [2007] NSWCA 243

[79] C Sherry "How indefeasible is your strata title? Unresolved Torrens problems is strata and community title" (2009) 21(2) *Bond Law Review* 159

[80] The by-law was part of the ill-fated Rosneath Farm permaculture development: *Grant and The Owners of Rosneath Farm - Strata Plan 35452* [2006] WASAT 162 at [171]-[173].

The best example of by-laws that regulate self-regarding behaviour are by-laws that implement a blanket restriction on pets. Of course keeping a dog that barks all day and night is not a self-regarding act. It is an "other regarding act", a use of one's private property which effects and harms others and thus can legitimately be regulated. However, it is impossible to argue that keeping a goldfish in a bowl or even a cat that never leaves the house, is a use of one's property that has any effect on your neighbours.[81] As a tenant, it would be a use of property that effects the landlord's reversion and could legitimately be regulated by him or her in a lease, but it is not a use of property that affects the apartment next door or the common property and thus should not be regulated by the owners of those properties. Banning a person from keeping a pet that has no effect on their neighbours is a fundamental and unjustifiable infringement of the personal liberty and autonomy traditionally associated with private property. This is why in recent Queensland cases, applicants have sought to argue that blanket pet bans are invalid under the legislation as "unreasonable or oppressive."[82]

To illustrate this point, let's just 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?[83] This decision would not be tolerated. People would argue, consistent with the principle of negative liberty, that regulation of land-use is only justifiable to prevent harm to others. Regulation must be targeted so that it only captures harmful practices and does not inadvertently and sloppily scoop up harmless behaviour as well. We do not tolerate that kind of legislative overreach in democracies. Why should strata schemes be any different?

One reason they might be different is that apartment blocks are higher density than ordinary subdivisions and pet noise will more easily affect neighbours. This would justify regulating a level of noise that might not attract regulation elsewhere, but it does not justify regulating no noise at all. It

[81] The Adjudicator in *Pivotal Point Residential* [2008] QBCCMCmr 55 raised this issue but declined to rule on it in relation to a blanket pet by-law.

[82] Clause 20, sched 5 of the *Body Corporate and Community Management Act* 1997 (Qld) 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 s91(3). See *Pivotal Point Residential* [2008] QBCCMCmr 55 (in which the Adjuicator declined to rule on the issue); *Beattie Place South* [2009] QBCCMCmr 27(in which the Adjudicator held that the by-law was not unreasonable or oppressive as it provided certainty).

[83] This was the argument accepted by the Adjudicator in *Beattie Place South* [2009] QBCCMCmr 27 to justify a blanket ban on pets.

could also be argued that strata schemes contain common property from which other owners are entitled to exclude animals, however, in an ordinary subdivision, while I can exclude my neighbours' cats from my house, I can't legally exclude them from my yard.[84] As a member of a community, I am expected to tolerate them. I do not have to tolerate my neighbour's dog barking at 3 am,[85] but his cat sunning itself on my lawn, and even less picturesque activities,[86] I am required to accept. Ironically, the same is true for strata owners. They can write by-laws to exclude cats owned by people within their own scheme, but cats belonging to owners in the scheme or house next door can enjoy outdoor common property with impunity. This ludicrous contradiction arises because by-laws give strata owners regulating rights that are inconsistent with the principles that govern all other property law. They allow strata owners to regulate behaviour that is actually or effectively self-regarding and in doing so they inevitably cause dispute.

The only justification for regulating pets within strata schemes is the same justification that is used in relation to all other property – if the pet in question has harmed others. The regulation may be stricter in a strata scheme because a dog barking every time somebody knocks at the door may cause harm to neighbours in a way that it would not in a large subdivision, but the regulation must still relate to actual harm. Banning an entirely silent, elderly labrador because he is chubby is an arbitrary and unjustifiable infringement of the fundamental freedoms associated with private property.

There are other by-laws in strata and community schemes that regulate effectively self-regarding behaviour, most of them architectural by-laws which are at the heart of low-rise master planned estates. The advantage of architectural by-laws is that they create a uniformity and permanence in

[84] Section 31 of the *Companion Animals Act* 1998 (NSW), is a classic enunciation of the "harm principle", allowing for the removal of "nuisance cats". They are defined as a cat which makes "a noise that persistently occurs or continues to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of any person in any other premises, or repeatedly damages anything outside the property on which it is ordinarily kept". The *Animal Management (Cats and Dogs) Act* 2008 (Qld), *Dog and Cat Management Act* 1995 (SA), *Cat Management Act* 1989 (Tas) do not seem to regulate the activities of cats at all. Western Australia has a *Cat Bill* 2011 (WA), but it seems to be aimed at sterilizing cats rather than controlling their ordinary suburban movement. Cf *Domestic Animals Act* 1993 (Vic), s23 of which gives power to an owner to seize a cat if it is found on their property on more than one occasion.

[85] For example, section 21(1)(b) of the *Companion Animals Act* 1998 (NSW).

[86] Interestingly, a dog is defined as a "nuisance" if it repeatedly defecates on property outside that which it is ordinary kept, (s21(1)(c)), but a cat is not.

design that is not possible to attain using orthodox property law,[87] however they also cause dispute and frustration when people move into schemes assuming, quite rationally and consistently with negative liberty, that they will be able to determine certain features of their own home. Of course people will rightly point out that it is a purchaser's responsibility to understand the title he or she is acquiring. All by-laws are included in contracts of sale, as well as being available for public inspection on the Torrens register, so they should not come as a surprise to any new owner. However, just because a purchaser knows about a restriction does not make it justifiable. There is not space or time here to go into the literature on disclosure, but suffice to say that while disclosure is a fundamental principle of land law, it is not a cure-all. Some things, even if disclosed should not be enforceable. The fact that racially restrictive covenants were disclosed to purchasers does not make them right. As the original owner in a scheme I could write a by-law requiring all other owners to clean lot 1, the penthouse which I happen to own, every week. Prima facie, the by-law may be valid,[88] but it would not be right, regardless of whether the other owners had notice of it. As Hanoch Dagan says, "[p]roperty is not a panacea that can miraculously detach private law from social values."[89] Ultimately the legitimacy of private law, in particular that associated with property, depends on whether it is socially and politically justifiable. One of the functions of modern property law is to ensure that "some relationships are out of bounds...some contract terms are off the table...[and] there are some things you should not ask of others; there are some demands that cannot justly be made in a free and democratic society."[90]

So, what can architectural by-laws legitimately demand?[91] Building materials? Certainly. If you buy into a development and all of the houses are made of a particular material there will be economic value in that consistency. A neighbour building in a cheaper or radically different material may reduce the value of your home and you may be harmed in a legally relevant way. Judged by the principle of negative liberty, a regulation that prevents the neighbour doing so will be legitimate. Orthodox

[87] Sherry, "The legal fundamentals of high rise buildings and master planned estates", above note 20.

[88] Strata Plan 36965, an alternative community in northern New South Wales, has a by-law requiring lot owners to do "Voluntary Community Work Hours" to maintain common property or pay money in lieu.

[89] Dagan, "The Limited Autonomy of Private Law", above note 6, p814.

[90] Joseph W Singer, "Democratic Estates: Property Law in a Free and Democratic Society", (2008-2009) 94 *Cornell Law Review* 1009-1062, p1048.

[91] By legitimate, I do not mean according to existing legislation, but rather morally, socially or politically justifiable.

property law has long tolerated this in the doctrine of restrictive covenants.[92] What about plants in the garden or blind colours? Will it *really* reduce the value of your home if a neighbour plants roses instead of Australian natives and has cedar blinds instead of white? Frankly, it is unlikely. While you might hate roses and cedar blinds, orthodox property law would treat those choices as self-regarding acts that cause you no legally relevant harm.[93] The flow on effect from this approach is two-fold. First, your neighbour is entitled to enjoy freedom and autonomy, values that we hold dear in democracy and secondly, you will be required to tolerate his or her preferences, even if you do not like them. Tolerance of difference, the flip-side of negative liberty, is a fundamental part of a plural, functioning democracy and of much greater value than uniform design. As the sociologists and planners here would attest, it is one of the factors that distinguishes life in modern metropolises in which most of us choose to live from the oppressive social regimes that can exist in rural villages, particularly in the past.[94] Do we really want to live in a community where people's tolerance does not extend to occasionally sharing a lift with a golden retriever and where their sensitivity is given legal legitimacy?[95] A community where people are encouraged to fixate on their neighbours' paint colours, lawn length or plant choice and are empowered to institute legal proceedings to fine them for diverging from the majority's preference? The experience in the United States suggests that these kinds of regulation that people do not anticipate and thus consider illegitimate, generate high levels of dispute.[96] "No homeowner association rules" has become a positive marketing slogan in some developments as a result. When rolling out strata and community title developments with reams of by-laws, we need to think seriously about their potential not simply to compromise the marketability of

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[92] *Tulk v Moxay* (1848) 2 Ph 774; 41 ER 1143; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (CA) and *Pirie v The Registrar General* (1962) 109 CLR 619; [1965] ALR 860.

[93] While it would be possible to write a restrictive covenant that limits plants in the garden to Australian natives and blind colours to white, a person suing for breach of the covenant would be unlikely to receive anything more than nominal damages and would be unlikely to secure an injunction to compel their removal. For applicable cases see A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia*, (Buttworths, Sydney, 2000), pp443-481.

[94] Jane Jacobs' classic text *The Death and Life of Great American Cities*, (The Modern Library, New York, 1993), pp 74-81, discusses this phenomenon well, describing the civilised reserve of city dwellers in 1950s Greenwich Village who watch out for children in the street but do not pry into their neighbours' lives.

[95] In *Ephraim Island - Subsidiary 105* [2007] QBCCMCmr 205, 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."*

[96] P Franzese, "Privatization and Its Discontents: Common Interest Communities and the Rise of Governemtn for "the Nice"", (2005) 37 *Urban Lawyer* 335.

schemes, but to undermine the fabric of our diverse and predominantly tolerant, democratic society. To return to the argument at the beginning of the paper, as property is not simply an aggregation of individual entitlements but rather constitutive of a social regime, when we create property rules we must ask ourselves, "In which world would we rather live?"[97]

Conclusion

This paper has identified two of the ways in which strata and community title differ from orthodox property law.[98] First, strata and community title fragment titles, creating a quasi-feudal form of ownership where too many people have powers of veto over land and where acquisition of title automatically imposes a range of positive and negative obligations on owners. Second, strata by-laws go beyond the ordinary principle of land regulation to prevent harm to others, controlling private, self-regarding acts. These divergences from orthodox property law have the potential to cause serious economic and social harm.

As strata and community title subdivisions are extremely hard to dismantle once created, we need to be cautious when extending our strata footprint. First, we must recognise that while strata and community title are essential for high-rise subdivisions, they are not for low-rise master planned estates. Lawyers, councils and state governments should be circumspect in using this form of title for subdivisions that could be achieved through orthodox means. Second, where strata or community title are indispensible, caution should be used drafting by-laws so that they do not offend the principle of negative liberty, thus fuelling dispute and undermining the value of tolerance in our liberal, democratic community.

[97] Singer, *Entitlement*, above note 8, pp137-138. See also, Singer, *The Edges of the Field*, above note 4, p20.

[98] There is a third fundamental difference in the ability of the collective to alter individual's property interests after they have acquired them. See Sherry, "How indefeasible is your strata title?", above note 79.