Strata Title: The New Feudalism

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ABSTRACT

High rise and master planned development are a global phenomenon. However, property law differs between jurisdictions, requiring developers to use varied doctrines of private law to support similar developments. Private property law sometimes stymies rather than facilitates development, leading developers to instigate changes in property law that are not always beneficial to the wider community. In Australia, the United States and England, high rise and master planned communities have been supported by changes in the common law and legislation, and consequently create complex property relationships that have traditionally been prohibited in post-feudal property law. The purchase of a freehold title no longer necessarily allows citizens to enjoy land subject only to public law. The purchase of a freehold apartment, or house in a master planned estate, will often enmesh a purchaser in a complex web of personal and financial obligations, as well as subject them to detailed, intrusive, privately-written by-laws. As a result, there has been an unanticipated and insufficiently considered shift in the morality and legitimacy of modern property law.

INTRODUCTION

High rise buildings and master planned communities are a global phenomenon, with many international companies rolling out physically consistent developments from Sydney to Singapore to London. While principles of engineering and design may be universal, legal systems are not and jurisdictional differences in private property law affect the ability of developers to create the kinds of communities they want to market. As the majority of land in many countries is privately owned, private property law is and always has been fundamental to property development.[2] While public planning law will regulate the initial construction of developments, ultimately secure private titles to all of the land, airspace and facilities will need to be allocated for those developments to be sold.

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[2] Private ownership in Australia is particularly high, with 95% of housing in the private sector. 33% of households own the freehold title of their homes outright, 35% own the freehold and have a mortgage, 24% rent from a private landlord and 5% rent from a state or territory housing authority, (ABS 2010, p.320).

Further, private property law will regulate the on-going rights and responsibilities of successive multiple titleholders of individually- and collectively-owned space.

Property law is not always amendable to the aims of urban planners, architects, designers or property developers. Consequently, developers and their lawyers been instrumental in instigating changes to property law to facilitate development. In the past, these changes were most likely to come through the evolution of the common law; today, they are likely to come from the legislature. Either way, the consequences of these changes are not simply that they make developer's lives easier and more profitable. As developers are building the places in which large sections of a community will work and live, these changes have implications for us all. The purpose of the paper is to look at the ways in which changes to property law which facilitate the kinds of developments developers would like to market, have a largely unanticipated, far-reaching effect on our community.

The importance of property theory

Property law does not fall out of the sky. It is made by people in order to regulate access to the limited and essential resource that is land. Most property theorists agree, there is no 'inevitable content' to property law, (Dagon 2008, p.814). Property is a contested concept, and we argue for what is in and what is out of protected property rights, (Alexander et al 2008).

Property theorists also agree that the property rules we chose help to construct our social and political system and that as a result, we must be attentive to the systemic effects of exercising property rights, (Singer 2008, pp.1049-50). As Singer says, 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', (Singer 2000, pp.215-6). Dagon reasonably asserts that the test of the legitimacy of private property law is whether the rights it creates amount to 'justificatory practice' determined by reference to social values, (Dagon 2008, pp.814-5). A number of property theorists have rightly insisted that whether scholars, lawyers or the public acknowledge this, property law always has a connection to basic morality, (Merrill and Smith 2007). Rose describes the 'second-best morality' of property, (the compromise position of most property rights), noting that property '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', (Rose 2007, 1900).

Perhaps the best illustration of the way in which private property law reflects a community's morality and helps to construct its social and political system is the endemic use of racially restrictive covenants in American suburban development in the twentieth century. Covenants are a pertinent example, because as will be explained below, they have always been an essential tool for property developers.

In 1917 the United States Supreme Court in *Buchanan v Warley* 245 US 60 (1917) ruled that it was unconstitutional for municipalities to racially segregate housing through zoning laws. 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, (Kushner 1979). On a micro level, these covenants were simply voluntary contractual agreements between an original vendor and purchaser that the purchaser would agree to his or her 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 all freehold covenants is that rational individuals negotiate agreements that maximise the economic value of their land, (Epstein 1981). If it transpires they are wrong about the wealth-maximising effect of a covenant, it is they who will suffer. Racially restrictive covenants were taken up enthusiastically by the US real estate industry and even the Federal Housing Authority, (McKenzie 1994, p.65). They were finally outlawed by the Supreme Court in 1948 in *Shelley v Kraemer* 334 U.S. 1.

It should be obvious that racially restrictive covenants were not simply the exercise of a private property right, but multiplied millions of times across time and space, the creation of a system of residential apartheid. The covenants did not simply affect the parties to the transactions, but obviously affected those outside the transactions, who were excluded from land, radically reducing their housing choice and deeply affronting their dignity. Racially restrictive covenants have also had an enduring effect on American suburbs and society; for example, the United States continues to struggle with the problem of racially segregated schooling, which has its genesis in neighbourhoods segregated by the operation of private property law, (Asher 1979; Kozol 2005).

Racially restrictive covenants remind us that property doctrines are not the manifestation of incomprehensible technicality, whose rationale is lost in the mists of time; property law constructs

social, political and economic relations between people with respect to the limited and essential resource that is land.

Post-feudal property law in common law systems

Racially restrictive covenants are an instance in which private property law went horribly wrong. However, aberrations aside, modern property law typically encapsulates, creates and strengthens many of the essential values of modern democratic society, (Singer 2008). Core values which include personal freedom and privacy, frequently enjoyed in the home.

Modern property law does not do this by accident. It is the result of centuries of effort on the part of judges, and later legislatures, to eradicate doctrines of feudal property law that limited personal freedom and served the values of feudal society, (Simpson 1986). The Statute of *Quia Emptores* 1290, the simplified estates system without fees tail, the rule against perpetuities and the *numerus clausus* principle (Merrill and Smith 2000) all help to construct standardized, simplified property rights, free from non-possessory owner control. Heller calls them 'boundary rules'; modern legal doctrines that separate property categories and 'keep resources well-scaled for productive use', (Heller 1998, p.1166). Unlike contract law which allows parties considerable freedom to dream up almost any bargain they please, property law is very restrictive, particularly in relation to the fee simple. Parties cannot create novel fees simple,[3] and they are limited in their ability to control a fee simple through time. Ironically, it is these limitations which create the freedom we enjoy in modern land ownership. When we inherit or more likely purchase land, in many common law jurisdictions it will be a fee simple, which subject to public law, we are free to live and work on as we please…with the exception of limiting the freedom of our successors in title.

In the centuries that property law strove to eradicate controlling doctrines of feudal land law, one anomaly emerged, the freehold covenant. In Anglo-Australian law, freehold covenants have their genesis in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143, in which Lord Cottenham decided that a fee simple purchaser was bound by the contractual agreement of a predecessor in title because he was aware of the agreement. Realizing the disastrous consequences of this decision, courts swiftly back-

[3] *Keppell v Bailey* (1834) 2 My & K 517; *Hill v Tupper* (1863) 2 H & C 121; (1863) 159 ER 51.

tracked, limiting covenants to those that benefit land, not a business or person,[4] and most significantly, covenants that only include restrictions, not positive obligations.[5]

In the United States freehold covenants have an alternative genesis and more wide-reaching effect. In an act of judicial creativity that even outstripped Lord Cottenham, in an 1852 commentary on *Spencer's Case,* Judge Hare 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 1981). As a result, in America, a covenant by a fee simple purchaser to perform positive obligations, (for example, to pay money), will run with the land so long as the obligations 'touch and concern' the land. These covenants are known as 'real covenants' and along with the later adopted *Tulk v Moxhay* equitable restrictive covenants and easements, make up the US concept of 'servitudes'.

The law in relation to freehold covenants in England, Australia and the United States is notoriously complex. This is a direct result of judicial ambivalence; it is not clear that covenants' benefits outweighed their detriments. Unlike leasehold covenants which eventually come to an end, freehold covenants, like the fee simple to which they are attached, theoretically go on forever, operating as a form of 'dead-hand control', something modern property law has striven hard to eradicate. If covenants apply to wide swathes of land, they operate as a system of private legislation, regulating the use of land and behavior of large numbers of people, in the present and future. With the stroke of a lawyer's pen, covenants hobble the freest, most fulsome interest in land, the fee simple, with a myriad of restrictions, and in the United States, positive obligations, potentially compromising the social and economic value of land. As Reichman noted, freehold covenants, in particular positive covenants, threaten to undo centuries of hard work, creating the possibility of 'modern variations of feudal serfdom', (Reichman 1981, p.1233).

Freehold covenants and global property development

[4] Outside statute, a covenant cannot exist in gross: *London County Council v Allen* [1914-15] All ER Rep 1008; [1914] 3 KB 642; *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227; *Tooth & Co Ltd v Barker* [1960] NSWR 51; (1960) 77 WN (NSW) 231.

[5] *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (CA); *Pirie v Registrar General* (1962) 109 CLR 619.

Despite judges' ambivalence about freehold covenants, property developers have used them enthusiastically for over a century. This is because covenants allow residential developments to be privately planned and controlled, the promise of which aids marketing. However, in England and Australia, because freehold covenants can only *restrict* land use and not impose positive obligations, they have long presented a stumbling block for high rise development and master planned communities with shared facilities.

High rise buildings *must* have common areas (foyers, lifts, carparks) which require money to be maintained. Master planned estates *may* have common areas and facilities (tennis courts, swimming pools, parks, lakes, woodland), which also require money to be maintained. If those high rise buildings or master planned estates are divided into individual *freehold* titles it is impossible to impose on-going obligations to pay maintenance money for common areas on individual owners using orthodox English and Australian property law. That is why although it has always be possible to have 'flying freeholds' (fee simple ownership of sections of a building) in English and Australian law, they were rarely used for apartment development (Clarke 1995, p.487).

When the opportunity to make money out of apartment construction was first presented in Australia at the turn of the twentieth century, developers borrowed the concept of 'co-operatives' from the United States to overcome the impossibility of imposing maintenance obligations on freehold owners. With co-operative or 'company title', purchasers do not own land, but rather shares in a company that owns the land. Maintenance obligations are imposed on the company via the articles of association.

In England, leasehold title avoided the problem of positive obligations on freehold title, and was always used for apartments in preference to flying freeholds; despite the enactment of commonhold legislation, leasehold continues to be used to this day, (Brown 2013). This is because, unlike the United States and Australia, England has a long and accepted tradition of leasehold tenure, not only for apartments but as a means of private residential planning. Over the centuries, the English aristocracy and land-owning institutions used long-term leasehold to develop their land, turning London and other British cities from meadows and swamps into dense, residential centres. 'Building leases' mandated building materials and styles, set-backs, central garden squares, and hydraulic infrastructure,

theoretically ensuring a high standard of initial construction. Subsequent 99-year leases were used to control the social make-up of neighbourhoods, maintain their residential character, and preventing further subdivision, (Summerson 1978; Cruickshank and Burton 1990; Dyos 1961; Olsen 1964). Leasehold tenure was the legal tool Ebenezer Howard envisaged would create his Garden City (Howard 1905). A group of trustees would own the freehold title to the land, granting residents and businesses leasehold interests. The Garden City ideals would be implemented through the terms of the trust and the leasehold covenants. Leasehold is used for modern UK gated communities, (Blandy and Lister 2005). One of the advantages of leases for planning purposes is that their covenants can contain a wide range of restrictions and positive obligations, and so long as they 'touch and concern' the land, they will be enforceable against successors in title.

Marking the early stages of globally homogenized property development, Ebenezer Howard's ideas were very popular in both Australia (Freestone 1989) and the United States, (McKenzie 1994); however the legal structure he relied on was not. Long-term leasehold was politically unpalatable in the New World, as it smacked of an oppressive aristocracy and the land insecurity from which so many immigrants had fled, (Davison 1993, p.65; McKenzie 1994, p.8). If Howard's planning ideals were going to be implemented by planners and private property developers in the antipodes, alternative legal means would need to be found.

Australia initially compromised by using restrictive covenants. These could not mandate obligations to pay money and consequently could only be used for relatively minimalist master planning. Building materials could be restricted to brick and tile, subdivision and multi-stories were prohibited, but open space had to be publicly owned and maintained. For most of the twentieth century, this limited collectively-enjoyed facilities in suburban development to public parks, sports fields and bushland. The enforcement of restrictive covenants requires individual owners to sue their neighbours, and a result, they are often more honoured in the breach than observance, (Sherry 2008, pp.6-8).

Twentieth century American suburban development took a different trajectory. As McKenzie has so masterfully documented (McKenzie 1994), in implementing Howard's ideas United States developers took advantage of the anomalous 'real covenant', which allowed positive obligations to pay

money for the upkeep of common facilities to be imposed on successive freehold owners. Real covenants became more effective still when courts accepted that a separate association of owners, which did not necessarily own any land, could collect and administer money on owners' behalf, as well as enforce other covenants.[6] McKenzie describes the modest development of private residential communities in the first half of the twentieth century and their exponential development in the post-WWII building booms. In 1975 there were 20,000 homeowner associations (HOAs) in the United States, (McKenzie 1994, p.107); by 1990, there were 130,000, (Dilger 1991, p.17) and today, there are over 300,000 HOAs, with 60 million residents, (McKenzie 2011, p.2). The rise of HOAs has been described as the single most important change in United States residential property law in the twentieth century, (Alexander 1989, p.5).

Like the United States, Australia experienced successive post-WWII residential building booms, and the time proved right for developers to tackle the problem presented by the prohibition on positive obligations on freehold land. Developers were no longer content to copy an approximation of developments they had seen oversees. They wanted to be able to engage in large-scale construction of apartment buildings, and later, master planned communities with facilities, and to ensure that they were marketed with the freehold title that the Australian population demanded.

Australian developers pressured state governments to enact legislation. The first enactment was the New South Wales *Conveyancing (Strata Titles) Act* 1961 which created freehold titles for apartments, burdened by positive obligations to pay money for the upkeep of the building contained in compulsory statutory levies, as well as the capacity to create further obligations and restrictions on title through developer and owner-written private by-laws. The Act was written by a government committee that was instigated, supervised and *paid* by a consortium of private property developers, (Kondos 1980). New South Wales' strata title legislation was subsequently copied by all other Australian states, as well as multiple overseas jurisdictions, including Malaysia, Jamaica and New Zealand.

The second enactment was the Queensland *Group Titles Act* 1973 which allowed the imposition of positive obligations in the form of levies, and the creation of privately-written by-laws, on low-rise

[6] *Neponsit Property Owners' Association, Inc v Emigrant Industrial Savings Bank* 278 NY 248 (1938).

master planned estates. During the Parliamentary debates on the Act, the Opposition revealed that the Minister for Justice's Second Reading speech was taken directly from a letter sent to the Queensland Law Commission by the lawyers of one of the state's largest developers, Hooker Centenary, (Sherry 2014). Hooker had been forced to use a complicated company title and easement structure for the initial cul-de-sac or 'court' subdivisions in their Brisbane Centenary Estates project to overcome the limitations in Queensland covenant law. The developer suggested the pressing need for legislation to change this state of affairs and the Government obliged. All other states eventually followed suit, with 'community' or extended strata title legislation that facilitated the replication of US-style HOAs in Australian cities.

The problem with the legislative avoidance of the prohibition of positive obligations on freehold land is that it was done with insufficient appreciation of the social, economic and political rationale for the rule, (Sherry 2013). Compelling freehold owners to pay for the maintenance of a shared lift, car park or roof is perfectly reasonable. However, the legal mechanism that permits this (statutory levies), as well as the existence of a separate body corporate which can be bound to contracts by a developer, allow developers to compel freehold owners to pay for gyms, well-being centres, transport infrastructure, sewerage, parks, bushland, educational facilities, roads, management services and tourist infrastructure. This not only benefits developers who can market these facilities as 'exclusive', but local and state governments, who not only avoid initial infrastructure costs, but most costs in perpetuity. Infrastructure has become private property which is the sole responsibility of the private home owners. Further, while it might be reasonable to regulate how residents use a shared park or road, the legal mechanism that permits this (privately-created by-laws), also permits rules that ban pets, determine paint colours, outside furniture, plant type, children's play, vehicle ownership, personal dress and behavior.

The avoidance of the traditional prohibition on positive obligations on freehold land, (judicially achieved in the United States and legislatively achieved in Australia), caused a shift in the morality and arguably, legitimacy of modern property law. Ownership of land no longer entails the freedom that post-feudal property law strove so hard to create. In high rise buildings and master planned estates, ownership of land enmeshes people in complex webs of personal and financial obligation. Owning an apartment, or house in a master planned estate, might effectively bind a purchaser to a long-term

management contract with a company with whom they have never negotiated and whose services they no longer need or desire, (Blandy et al). Land that was for centuries minimally regulated – public space and private homes – is now subject to detailed rules and restrictions. This is not regulation created by governments controlled by the traditional limits on power crafted by constitutional and administrative law; it is regulation written by private citizens, either developers or homeowners, on whom limited (McKenzie 1994, pp.122-149) or negligible (Sherry 2013) restraints have been placed. It should not be a surprise that these developments, their complex contracts and property rights, are the frequent subject of litigation and dispute.

Conclusion

Property law is notoriously technical. This is not so professors can torture students with arcane doctrines or so lawyers can charge clients exorbitant fees. Property law is complex because it is performing the extraordinarily difficult but essential task of regulating multiple people's access to the limited resource that is land. We all have to be present on a piece of land at all times and we can't all stand in the same space. When property law grants rights to one person, it inevitably takes them away from another. Further, property law does not grant rights to a single person, it typically grants rights to all citizens, who in exercising multiple property rights, create social, political and economic systems. As a result, we need to be attentive to the consequences of exercising property rights, particularly newly created rights.

High rise developments and master planned communities with mandatory levies, private governing bodies and private by-laws all create complex property rights that have traditionally been prohibited in post-feudal property law for sound reasons. Now, when purchasers buy into many modern developments, they are not acquiring a freehold title that will allow them extensive personal freedom, subject only to public law. They are acquiring a title, (typically still freehold), that will necessarily require them to pay for maintenance, and necessarily place some restrictions on their use of common property. However, they are also likely to be acquiring a title that will compel them to pay for a range of optional facilities and services provided by the developer to increase sales, as well as subjecting them to a battery of rules that will penetrate into their home and private lives. The conclusion of the paper is in acceding to developers' demands for the law to help them to build the complex developments they wish to market, we have inadvertently created a 'modern variation of feudal

serfdom', (Reichman 1981, p.1233). Ownership of some land now creates complex webs of obligations and restrictions in relation to people's finances and private lives, which in turn cause dispute.

References

ABS (Australian Bureau of Statistics) 2010, *Australian Year Book 2009-10*, cat.no.1301.0, ABS, Canberra.

Alexander, G.S. (1989). Dilemmas of Group Autonomy: Residential Associations and Community, *Cornell Law Review*, vol.75, pp.1-61.

Alexander, G.S, Penalver, E.M, Singer, J.W. and Underkuffler, L.S. (2008). A Statement of Progressive Property, *Cornell Law Review* 94(4), pp.743-44.

Blandy S, Dupuis A & Dixon J. (2010) Multi-owned Housing: Law, Power and Practice. Ashgate Publishing: Aldershot.

Blandy S & Lister D (2005) Gated communities: (Ne) Gating community development? *Housing Studies*, 20(2), pp.287-301

Brown, J. (2013) English Commonhold: A Failed Experiment? 3(2) *Property Law* Review, pp.85-98.

Clarke, D.N. (1995). Commonhold – A Prospect of Promise *Modern Law Review*, 58(4), pp.486-504.

Cruickshank, D. and Burton, N. (1990). *Life in the Georgian City*. Viking: New York.

Dagan, H. (2008). The Limited Autonomy of Private Law *American Journal of Comparative Law*, 56(3), pp.809-834.

Davison, G. (1993) The Past and Future of the Australian Suburb *Australian Planner*, 31(2), pp.63-69.

Dilger, R. (1991) Residential Community Associations: Issues, Impacts, and Relevance for Local Government *State and Local Government Review*, 23(1), pp.17-23.

Dyos, H.J. (1961) Victorian Suburb: A Study of the Growth of Camberwell. Leicester University Press: Leicester.

Epstein, R.A. (1981) Notice and Freedom of Contract in the Law of Servitudes, *Southern California Law Review*, 55(6), pp.1353-1368.

Freestone, Robert. (1989) Model Communities: The Garden City Movement in Australia. Thomson Nelson: Melbourne.

Heller, M.A. (2008). The Boundaries of Private Property, *Yale Law Journal*, 108(6), pp.1163-1224

Howard, E. (1902) *Garden Cities of To-morrow*. Swan Sonnenshein: London.

Kondos, A. (1980) The Hidden Faces of Power: A Sociological Analysis of Housing Legislation in Australia In Tomasic, R. (Ed.), *Legislation and Society in Australia*, Unwin Hyman: Sydney.

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

Kushner, J.A. (1979). Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States, *Howard Law Journal*, 22(4), pp.547-686

Merrill, T.W. and Smith, H.E. (2000) Optimal Standardization in the Law of Property: The Numerus Clausus Principle, *Yale Law Journal*, 110(1), pp.1-70.

Merrill, T.W. and Smith, H.E. (2007) The Morality of Property, *William & Mary Law* Review, 48(5), pp.1849-1896.

McKenzie, E. (1994) *Privatopia: Homeowner Associations and the Rise of Residential Private Government*. Yale University Press: New Haven.

McKenzie, E. (2011) *Beyond Privatopia: Rethinking Residential Private Government*. Urban Institute Press: Washington DC.

Olsen, D.J. (1964). *Town Planning in London: The Eighteenth and Nineteenth Centuries*. Yale University Press: New Haven.

Reichman, U. (1981) Toward a Unified Concept of Servitudes, *Southern California Law Review*, 55(6), pp.1177-1260.

Rose, C.M. (2007) The Moral Subject of Property, *William and Mary Law Review*, 48(6), pp.1897-1926.

Sherry, C. (2008) 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, *Australian Property Law Journal,* 16(1), pp.1-23.

Sherry, C. (2013) Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn From Traditional Doctrines of Property, *University of New South Wales Law Journal*, 36(1), pp.280-315.

Sherry, C. (2014) Land of the free and home of the brave? The implications of United States homeowner association law for Australian strata and community title, *Australian Property Law Journal*, 23, pp.94-121.

Simpson, A.W.B. (1986) *A History of the Land Law*. Clarendon Press: Oxford.

Singer, J.W. (2000) *Entitlement: the paradoxes of property*, Yale University Press: New Haven.

Singer, J.W. (2008) Democratic Estates: Property Law in a Free and Democratic Society Essay, *Cornell Law Review*, 94(4), pp.1009-1062.

Summerson, J. (1978). *Georgian London.* Penguin Books: London.