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CAN LARGE-SCALE PRIVATE REGULATION OF LAND BE LEGITIMATE? THE PROBLEM OF STRATA AND COMMUNITY TITLE LEVIES AND BY-LAWS

CATHY SHERRY

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UNSW Law
UNSW Sydney NSW 2052 Australia

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Can large-scale private regulation of land be legitimate? The problem of strata and community title levies and by-laws

Introduction

Multi-owned properties are socially, economically and legally complex. They create interpersonal relationships between developers, purchasers, tenants and building managers, in relation to a particular parcel of land/airspace. This chapter will focus on the legal relationships between these parties, in particular relationships that are created by restrictions and obligations contained in strata and community title levies and by-laws.

The chapter begins by exploring the legitimacy of private regulation of land. All law needs legitimacy for people to respect and comply with it, and private law created by unaccountable citizens, such as strata by-laws, presents difficulties in this regard. The chapter explains the traditional source of legitimacy for private property law, the concepts of ownership, notice and consent. It then documents the challenge of genuinely identifying these phenomena in mass applications property law such as freehold restrictive covenants, and the consequent judicial reluctance to enforce privately-created restrictions and obligations on land. Next, the chapter draws the fundamental connection between freehold covenants and strata by-laws and levies, which seems to have been overlooked by Australian state legislatures and the judiciary. Finally, the chapter argues that many of the tensions and disputes that exist in multi-owned properties have their source in unrestrained divergence from traditional property law. It concludes that legislative and judicial limits on private rule-making power are indispensable, just as they have always been in relation to the limited and essential resource that is land.

What makes privately-created restrictions and obligations on land legitimate?

Land is fundamental to human existence and the law that regulates our use of land - property law - profoundly affects our lives. As legal philosophy Jeremy Waldron famously said,

> [e]verything 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. Since we are embodied beings, we always have a location', (Waldron, 1991, p296).

As a result, everything that we value in our lives - our work, our family, our personal relationships - occurs on a piece of land and if our use of that land is regulated, so too are our lives.

Property law is particularly interesting and problematic, because it is *private*, not public regulation of land and people's lives. In a democracy, public regulation of land obtains its legitimacy from the democratic process. Rules on height, density, building materials, residential, industrial or commercial use etc, are created by democratically elected representatives pursuant to detailed parliamentary, law-making procedure. Flaws in the democratic process aside, rule-makers are accountable. In contrast, private regulation of land has no such general accountability and consequent legitimacy.

Legitimacy for private regulation of land comes from fundamental underlying concepts in property law, primarily ownership, consent and notice. 'Ownership' in Australia, New

Zealand and the United States, is most likely to be a freehold fee simple, which is the most expansive interest in land in common law systems. Subject to government regulation, it entitles an owner to use land as they see fit. For example, if a fee simple owner wishes to grant a lease to another, they are entitled to do so, and in the process, regulate how the lessee uses the land. The lessee also owns an interest in land, albeit limited by time, but the restrictions on their use of the land are considered legitimate because they have voluntarily 'consented' to the restrictions in the lease by signing it.

If either the lessor or lessee decides to sell their interest in the land, the new owner(s) will be bound by the lease and obliged to only use the land according to its terms. This regulation of third parties who did not actually agree the terms of the lease is considered legitimate, because they had 'notice' of the lease; that is, they knew that it existed (typically because it will have been recorded on a central, accessible land register), and they went ahead and bought the fee simple or the lease. Voluntary purchase of land with notice of existing property rights is treated as consent to those rights and the restrictions and obligations they entail.

Ownership, consent and notice arguably work to justify private regulation of land on a small scale, for example between genuinely negotiating landlords and tenants, between neighbours who might grant and take an easement, or between individual vendors and purchasers. However, the legitimizing power of ownership, consent and notice is called into question in large-scale transactions which regulate large swathes of land and large numbers of people, many of whom cannot be considered to have genuinely consented to the terms of the private regulation embodied in the property or contract documents. This kind of regulation occurs when a developer imposes restrictive covenants over hundreds of homes in a residential subdivision

Restrictive covenants typically prevent subdivision of lots, multiple structures (eg granny flats), particular building materials (eg fibro, corrugated iron or colorbond) and commercial use, resulting in uniform building and land use within a subdivision. Covenants are imposed by developers to raise the aesthetic standard of developments and increase sale prices. Historically, many were imposed to implement the aesthetic and social aims of the Ebenezer Howard's (1902) Garden Suburb Movement (Freestone, 1989). The whole point of the covenants is that they are *non-negotiable*; they have to apply to *all* housing lots in the development to create the desired uniformity and purchasers are not free to pick and choose which restriction applies to their land. In an unlimited land market, despite lack of negotiation, purchasers could be said to have consented to the restrictions in covenants by deciding to purchase, but in reality, purchasers are choosing from a limited pool of logistically feasible, affordable properties, and in new residential areas, that pool may be dominated by developments that are subject to restrictive covenants.

Restrictive covenants are not only designed to be uniform, they are designed to endure. Covenants theoretically begin as contractual agreements between the developer and initial purchasers, (the purchaser promises never to subdivide, build above a storey etc), but covenants 'attach to land', transforming from contract to property rights that bind anyone who buys the land with 'notice' of their existence. This is because covenants could not maintain uniformity in an area if they could only be enforced against the initial purchaser; they only work if they can be enforced against whoever owns the land in the future as well.

Theoretically, it is acceptable for a covenant to restrict the new owners' use of the land because they 'consented' to the covenant by buying with notice of it, but just like original purchasers, they bought land from a limited pool and unrestricted land may not have been on offer.

Because covenants are designed to apply to large-scale residential subdivisions and to endure indefinitely, they operate as a *private* planning system. Initially developed in the 19th century case of *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143, when public planning systems were in their infancy, (Booth, 2003), restrictive covenants now operate in tandem with detailed public planning systems. But unlike public planning systems that are designed and enacted by publicly accountable, democratically elected governments, which are required to balance the interests and needs of all sections of the community, restrictive covenant regimes are created by unelected, unaccountable private citizens – developers, and to the extent we believe purchasers play a part in the creation of covenants by consent, private purchasers. These private citizens have no obligation to act other than in their own interests, which in the case of developers, will be to increase profit from sales, and in the case of purchasers, to buy and perpetuate land titles that suit their families and ideally increase their own sale price to a pool of like-minded subsequent purchasers. These self-interested decisions will determine land use in large sections of our cities, now and for an indefinite term into the future.

The widespread application of restrictive covenants further undermines the case for legitimacy through consent. This is because covenants affect people whose consent is not just questionable, it is entirely absent; that is, people who are excluded from residential subdivisions because of the existence of the covenant. The most extreme example of this phenomenon are the racially restrictive covenants that were endemic in the United States for much of the 20th century. These restricted residential subdivisions to people of 'the Caucasian race', (Kushner, 1979; McKenzie, 1994, pp 56-78)) creating a system of residential apartheid that harmed African American and Asian American citizens, severely limiting their housing choices and deeply affronting their dignity. African and Asian American citizens clearly did not consent to these covenants.

While private property law was not used for racial segregation in Australia, restrictive covenants still have harmful effects on those who have never consented to them. For example, minimum allotment size and building material covenants restrict residential areas to purchasers who can afford the correspondingly increased land price; residential only covenants exclude people who might have economic or social imperatives to work from or near home; and 'no subdivision' covenants prevent the constructions of multi-owned properties, exacerbating urban sprawl, increasing commuting times for thousands of city residents, as well as infrastructure costs for development forced to the urban fringe. None of these people so affected 'consented' to the covenants.

In some states in Australia, public planning law has been enacted to specifically override private covenants, putting planning decisions back in the hands of current, elected representatives. However, as this is theoretically the expropriation of a private property right (the covenant being a limited property right in someone else's land preventing them from using their land in a particular way), this is not the case in all Australia states. In those states, regardless of zoning, the private covenant prevails.

However, even when private covenants are not overridden with publicly enacted legislation, there are two ways in which the potentially harmful effects of covenants are limited. The first is the fact that covenants have to be enforced by private citizens. If a land owner is threatening to breach a covenant, for example by subdividing land or building in prohibited materials, the only people who can prevent this occurring are the owners of neighbouring land that is 'benefited' by the covenant. Needless to say, many people do not like suing their neighbours, and as a result, covenants are sometimes more honoured in the breach than observance, gradually falling into disuse. This reduces their propensity to stymie land use over long periods of time.

The second limit on covenants' ability to control land use is judicial ambivalence about their existence. That is, judges are implicitly or explicitly aware of questionable legitimacy of private citizens controlling land use for generations, and as a result, are reluctant to enforce them. The way in which this reluctance manifests itself in common law systems is the development of complex judge-made rules, with exceptions upon exceptions, resulting in a narrow class of circumstances in which covenants are legally valid. The complexity of United States covenant law is so bad that it has been described as 'an unspeakable quagmire....[of] foul smelling waters and noxious weeds', (Rabin, 1974).

The practical upshot of this legal complexity (in addition to many distressed law students), is that there are limited ways in which private land owners are allowed to control land use over time. For example, covenants must benefit neighbouring land, not a business or person who may disappear into the mists of time. In most common law systems (with the notable exception of the United States and Scotland), covenants can only contain restrictions and not positive obligations (Rudden, 1987). That is, a developer can impose a covenant *preventing* the purchaser and subsequent owners from doing particular things on the land, such as commercial activity or building in particular materials, but the developer cannot *compel* subsequent owners to do things, like build fences within a year of purchase or maintain a country club. The clearest example of a positive obligation is the payment of money. The prohibition on extracting money from successive freehold owners prevented Australian developers creating complex, tightly controlled private communities with private gyms, parks, roads, and management services, all of which require on-going monetary payment.

Freehold covenant law in Australia could be summarised thus: allowing long-gone owners to control land use into the future can be socially repressive and economically inefficient. As a result, courts were reluctant to allow on-going regulation through restrictive covenants, and developed complex rules to limit the circumstances in which they could be used. Consequently, although developers often employ restrictive covenants, covenants' content is limited and they are frequently not enforced, minimising their impact on people's land and lives.

Covenants and multi-owned properties

While the judge-made rule preventing the imposition of positive obligations on freehold land may seem an obscure technical part of property law, it had significant effects on the development of multi-owned apartment buildings[1] in Australia. This is because apartment

[1] The term 'apartment building' means any building in which there are multiple individual apartments. They are overwhelmingly strata title, which is the equivalent of condominiums in the United States. The term does not

buildings have to be collectively maintained and if they were to be developed as freehold titles, the most common and desired land title in Australia, the judge-made prohibition on positive obligations on freehold land would make it impossible to impose obligations to pay maintenance fees on owners. As a result, beginning with the *Conveyancing (Strata Titles) Act* in New South Wales in 1961, all states enacted special legislation to overcome the judge-made rules. Strata title legislation facilitates the creation of multiple, individual freehold titles in a single building, and the legislation itself imposes an obligation to pay annual levies. Owing to the high density nature of apartment living, the legislation also gives the collective owners, the body corporate, the right to make rules controlling not just the common property, but also individually-owned apartments. These two statutory provisions swept away fundamental principles of property law that had endured for centuries, namely that when someone purchases a freehold title, they are free to use the land as they please, and (with the limited exception of restrictive covenants), unconstrained by previous owners.

Because legislatures and the developers who pushed them (Kondos, 1980) were seeking to solve the practical problem of how to construct and then viably maintain relatively small-scale apartment buildings, little thought was given to the purpose of the traditional property rules that were being swept aside. In fairness to those involved, the complexity of restrictive covenant case law meant that the function of those rules was frequently obscured, (possibly even in the minds of the judges applying the rules). It is little wonder that when developers' lawyers then pressured legislatures to extend the strata title form from individual, medium/high rise buildings to large-scale, low-rise residential subdivisions so that developers could create highly regulated master planned estates with private facilities and private management companies, legislatures uncritically obliged (Sherry, 2014).

However, by sweeping away traditional property law rules, strata and community title law allow private citizens to regulate freehold land in ways that have hitherto been prohibited. As noted above, because we are all present on land at all times, regulation of land is actually regulation of people and their behaviour. Regulation of behaviour on residential land is regulation of people's private lives and relationships, the traditionally unregulated sphere in a liberal, democratic state (Sherry, 2013). The legitimacy of regulation of land through private property law depends on consent, assumed from voluntary acquisition of the land with prior notice of the regulation. However, consent to the complex regulation of large-scale and wide-spread strata and community title schemes is even more questionable than consent to wide-spread, boilerplate restrictive covenants.

Consent and legitimacy of regulation in strata and community title schemes

As other chapters in the book clearly document, multi-owned properties under strata and community title law subject owners and residents to a battery of obligations and restrictions. Some are undoubtedly necessary (Chapter XX), such as prohibitions on noisy floorboards or anti-social use of the pool. However, strata and community title by-laws go well beyond this kind of regulation, banning cats who never leave their owner's apartment, regulating where and how children play on open space, entrenching developer-chosen management companies, and stipulating species of garden plants, paint colour, letterbox size, window coverings, shade

mean what it does in the United States, that is, a building with a single landlord owner who leases all apartments to tenants. The ownership of an entire residential building by a single landlord was and remains very rare in Australia.

sails, and balcony furniture. Particularly in newer, 'resort-style' developments, by-laws are detailed and intrusive.

Like all private property law, the legitimacy of this regulation depends on *ownership, notice* and *consent* and strata and community title present problems in relation to all three.

Firstly, in relation to *ownership,* strata and community title create the very peculiar result of allowing people to regulate *other people's* property. By-laws that regulate common property are agreed by the majority of owners so that the majority are voluntarily regulating their own property, but the minority are having their property regulated by others with whom they disagree. By-laws that regulate private lot property, which are almost unlimited in many states, are the regulation of property by people, none of whom, (with the exception of the individual owner), own the property being regulated. So, a group of people who have no legal interest whatsoever in a house or apartment, (in contrast, for example, to a landlord), can ban a pet being kept in that home or can determine the colour of the curtains. This is highly unusual in property law, and quite obviously, if over-used, will cause dispute.

Strata and community title by-laws are simply the statutory equivalent of freehold covenants, that is, a restriction or obligation which binds land and any owner's use of it. Like covenants, they allow owners of land to create rules regulating its use that will endure well beyond their period of ownership. The most obvious manifestation are developers who create the initial set of by-laws. As the general aim of development is to sell the properties as quickly as possible, the developer has a short-term interest in the land, but the rules they create will potentially endure indefinitely. While subsequent owners can alter developer-made by-laws, obtaining the requisite majority can be difficult. As has been observed by property theorist Michael Heller, regulation like by-laws can operate as a ratchet – once created, rules are hard to wind back because of 'high transaction costs, strategic behaviours, and cognitive biases', (Heller, 1998, pp1165-6). Put simply, people do not like change.

Of course regulation of land by people who have never owned it or have ceased to own it, might be legitimated by *notice and consent*. In Australia by-laws must be recorded on the Torrens land register to be enforceable and this is publicly accessible for a minimal fee. As a result, all purchasers and tenants have notice of by-laws and if they acquire a property with notice of regulation, they can be considered to have consented to it.

However, in reality, there are multiple ways in which this notice and consent is called into question. Many strata and community title sale contracts are a lever-arched folder thick, 'disclosing' all of the relevant by-laws in complex legal documents that purchasers may not read or understand. Perhaps this is a failing for which they can be held responsible, except that even if they read the by-laws, like restrictive covenants, by definition, purchasers and tenants have no power to negotiate their terms; they are presented on a take it or leave it basis. Of course, in theory purchasers and tenants could 'leave it', except that homes are not an optional consumer item. We all need them and if all of the properties on offer in the purchaser's or tenant's attainable market have similar or identical by-laws, avoiding by-laws that ban pets, for example, may not be possible. If there was no realistic alternative to a property regulated by by-laws, it is difficult to conclude that purchasers and tenants have genuinely consented to their terms.

Further, in some circumstances, like off-the-plan sales, purchasers will not have seen the by-laws at all when they commit to buy. Off-the-plan sales, which have been common in Australia's property boom, occur when a purchaser contracts to buy an apartment that is not yet constructed. Strata plans are not registered until the building is complete, hence the phrase 'off-the-plan.' By-laws are required to be registered along with the strata plan and so if a purchaser signs a contract prior to the registration of the plan, it is also prior to the registration of by-laws. They have not in fact been given notice of the by-laws at all.

Even if purchasers and tenants have seen and read the by-laws for a scheme, by definition, by-laws can change. A scheme may begin as 'pet-friendly', inducing some people to buy, but become pet-unfriendly when the majority decide to ban all animals. At least in some states like New South Wales where there is no requirement for by-laws to be reasonable, there is nothing preventing schemes from enacting by-laws banning all pets immediately, forcing residents to either give pets away or have them euthanized, although human decency, if not the law, seems to prevent schemes doing this. However, schemes can and do 'grandfather' pets out, by allowing people to keep their existing pets until they die, but preventing them from replacing them, to many owners' great distress. Unlike public law-makers, those creating new pet bans have no obligation to act in anything other than their own interests. They are not required to balance the social or health effects of animal bans on their neighbours who may have bought into a scheme precisely because it was pet-friendly.

It is impossible to argue that people have consented to by-laws that did not exist at the time they purchased, though it is arguable that they consent to the possibility of new by-laws by 'voluntarily' purchasing into a legislative framework that allows for the change of by-laws. That may be true, but can people genuinely be said to have consented to any and all rules the majority may dream up? Can they be taken to have consented to a new by-law that requires them to perform regular manual labour on the common property, notify the body corporate before they allow friends to stay in their house, attend permaculture course, prevents them from installing solar power or other green utilities, or their children playing on the footpath outside their home? All of these are real and apparently valid by-laws.

Finally, even if we believe people who move into strata and community schemes are genuinely consenting to all regulation, just like restrictive covenants the more uniform and widespread by-laws are, the greater their ability to effect people *outside* strata and community title schemes who do not consent to them. For example, in apartment markets in New South Wales and Queensland where blanket pet bans are common, tenants and purchasers who have or want pets are significantly affected, being excluded from large sections of the residential market. None of these people have consented to the widespread banning of animals from residential land in their city, and the people who did consent to them were not required to consider anyone other than themselves when they created the ban.

Despite an identical questionable legitimacy, strata and community title by-laws are not limited in the way that restrictions on land are in orthodox property law. Firstly, unlike restrictive covenants whose enforcement requires neighbours to be prepared to mount expensive Supreme Court actions, by-laws are relatively easily enforced by professional strata managers or the body corporate by application to inexpensive tribunals. While it would be misleading to suggest that by-law enforcement is always easy and effective, it is

considerably easier than covenant enforcement and by-laws have a more consistent and intrusive impact on people's lives as a result.

Finally and most significantly, unlike covenants that are invalidated by a complex range of judge-made rules that severely limit the private power to regulate land, precisely because enduring private regulation of land has dubious legitimacy, there is almost no judicial limit on the by-law making power in most Australian states. Judges and tribunal members have generally not taken the initiative to craft judge-made rules, and they have been reluctant to use the albeit limited power some states' legislation grants them to declare by-laws 'oppressive' or 'unreasonable'. Taking their lead from the legislature, which gave communities broad by-law making powers, the prevailing attitude of the judiciary has been that if by-laws are created by the appropriate process and/or 'consented to' by the act of purchase, they are legitimate. In the words of the New South Wales Supreme Court in *White v Betalli* (2007) 71 NSWLR 381, 'there is nothing in the notion of a by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted'.

The 'hands off' approach of the Australian judiciary contrasts with the United States, where perhaps as a result of the tradition of racially restrictive covenants, judges are more sanguine about the benign nature of private rule-making power in multi-owned communities. The United States' *Restatement (Third) of Property, Servitudes* (2000) explicitly retains traditional judicial oversight of private regulation of land in modern multi-owned properties, invalidating obligations and restrictions that are unconscionable, unconstitutional, against public policy, unreasonable restraints on alienation, undue restraints on trade, or illegal. Further, judges have long recognised their own power to strike down community rules as 'unreasonable'.[2] Australian courts and legislatures would do well to look to American law in this regard, (Sherry, 2014).

What's law got to do with it?

Why does all of this technical property law matter anyway? It matters because tension, dispute and litigation in strata and community title in Australia are common and they can often be traced back to divergence from ordinary property law. For example, management rights – the practice of developers selling the right to manage a development to a management company prior to the sale of any apartments – has spawned mass litigation and dispute when purchasers discover that the management contract they are compelled to pay for up to 25 years is uneconomical and exploitative (Sherry, 2010; Johnstone, XX). Management contracts are effectively positive obligations on freehold land; if you buy the land, you have to pay the money. Positive obligations and thus management contracts cannot be imposed using ordinary Australian property law, which is why management contracts are only a problem in strata and community title estates.

Pet litigation is rife in Queensland and New South Wales, two states in Australia that allow by-laws banning all pets in people's homes, but pet litigation is suspiciously absent in Victoria, the state that does not permit blanket pet bans. Banning a pet would not be possible in ordinary property law, (not being a restriction that genuinely benefits neighbouring land), with problem pets being dealt with by state legislation, created in accordance with the debate

[2] *Hidden Harbour Estates v Norman* 309 So 2d 180, 182 [15] (Fla Dist Ct App, 1975)

and consideration of broad community needs that accompanies the passage of law in a democracy.

Underestimating levies by both developers and ultimate properties owners is endemic in many communities because having to pay for your own gym, pool, parks, roads, sewerage and security is an onerous financial burden. Underestimating levies causes dispute when it is inevitably discovered that initial levies cannot cover the objective costs of extensive facilities and infrastructure maintenance. This problem would not arise outside strata and community title because the prohibition on positive obligations on freehold land removes the incentive to provide expensive, privately-owned facilities.[3]

In none of these circumstances can notice and consent completely justify and legitimate these obligations and restrictions because of the tenuous nature of notice and consent in all large-scale regulation of land.

However, the solution is not to throw the baby out with the bath water and prevent the creation of all by-laws or monetary levies. Medium and high density development in multi-owned buildings is unavoidable in Australia cities and their maintenance must be funded and their use rationally regulated. The solution is for Australian courts and legislatures to recognise that strata and community title by-laws and statutory levies are simply positive and restrictive covenants on freehold land by another name, to remember the reasons Anglo-Australian courts prohibited or limited them, and to proceed with caution. For example, monetary obligations to pay for the costs of maintaining a shared building are inevitable and legitimate; monetary obligations to pay for long-term security, facilities and management contracts are not inevitable and may cause dispute. By-laws that prevent people making noise inside their apartments that disturbs neighbours are necessary, but by-laws that prevent people keeping a cat that never leaves the apartment are not. By-laws that ban children from playing in carparks are necessary; by-laws that ban children playing on common property lawns are not, (Sherry, 2016). Just as ‘notice’ and ‘consent’ do not genuinely legitimate widespread regulation with restrictive covenants, notice and consent do not legitimate any and all by-laws and monetary obligations in strata and community title. Legislation must limit the private by-law power, particularly in relation to individual homes, and courts and tribunals must continue to exercise their traditional supervisory role, striking down private regulation that is not objectively justifiable.

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[3] It should be noted that my argument is not that people should not have access to gyms, pools or other facilities, simply that they do not need to own them. Paying to use someone else’s gym may be more economically and socially rational.

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