PRIVATE GOVERNANCE OF CONDOMINIUM LAND: COMMON LAW VS STATUTE

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Introduction

Land law contains social, economic, and political values that are obvious to legal and property theorists. Those values are usually known to judges, although the time-pressures of modern justice can limit judges' ability to explicate those values in their decisions. This can make it hard for practising lawyers to see the underlying social, economic, or political rationale in property case law and doctrine. Further, commercial clients do not pay their lawyers to dwell on finer points of property theory. They pay them for legal work to complete their developments or property sales. While some developers take pride in their communities, few are likely to be driven by a desire to safeguard the traditional values in property law. Finally, while parliamentarians work to create optimal laws for their constituents, property theory is unlikely to be within their area of expertise.

It might be tempting to think a lack of understanding of the underlying values of property law is a theoretical concern, but it has become a problem for countries that allowed developers and parliamentarians - two groups unlikely to understand the underlying values of property law - to create the law on which most modern development depends. That is, countries that rely on legislation, driven by developers and made by legislatures, to support their strata developments, rather than countries that rely on common law and equity, made by judges. Australia, and the many countries that copied Australia's original *Conveyancing (Strata Titles Act) 1961* (NSW), fall into the former category, while the United States (U.S.), most notably, falls into the latter.

This chapter examines the underlying values of property law. It then considers whether those values are incorporated into strata legislation, in contrast to the common law. The final section of the chapter identifies real problems that residents and owners of legislatively-based strata buildings face as a result of an absence of the traditional values of property law in modern strata title Acts.

The values of traditional land law

Property theorists typically agree on several foundational aspects of property that inform the content of law. The first is a recognition that property, specifically land, is essential for human life. Everything we do and value occurs on a piece of land that we need a legal right to occupy. Homes are particularly important, not simply because we need shelter to survive, but because our private lives, relationships, families, freest selves, manifest in our homes (Radin 1981-1982). Although we acquire land through market transactions, land is not like other consumer items, which if we do not like what the market has to offer, we do not have to acquire. Homelessness is not a choice. Without a home we cannot live a fully human life (Singer 2000b, 27).

Second, land is finite. We cannot manufacture more and there are limits to our ability to share land. With the best will in the world, a single acre of land cannot support 100 people. When we allocate land to one person, of necessity we take it from others (Underkuffler 1996, 1043).

Finally, there is no inherent or inevitable content to property law (Dagan 2008, 814). It is geographically, culturally, politically, and historically specific. First and foremost, the natural world (soil, climate, topography, physics) determines property law. For example, without modern technology it is impossible to use most airspace, thus no society had complex rules relating to land 100 metres above the ground until after the invention of the steel frames and curtain walls that made high rise construction possible. Second, a society's culture, politics and economy determine what that society considers a legitimate claim to land. For example, many cultures, even today, consider it legitimate for men to have greater claims to land than women. Those rules of land law both reflect and in turn constitute political, economic, and social regimes in which women are subordinate.

Not surprisingly, the content of contemporary western property law is determined by the values of capitalist, pluralist democracy that help constitute those democracies (Singer 2008). Property law is often viewed as the rules that regulate transactions between individual

citizens, but those millions of transactions create political, economic, and social regimes (Singer 2000a). For example, if property law permits one person to permanently restrict use of their land to Caucasians, it permits a million people to do so, creating the potential for residential apartheid. This residential apartheid was realised in the U.S. where racially restrictive covenants – technical rules of property law - were endemic in the 20th century, with enduring and destructive results (Kushner 1979; McKenzie 1994, 68-74).

With the notorious exception of racially restrictive covenants, many values of modern property law are worth preserving. While there is no consensus over all values, base values include equal access to land for all citizens; freedom to use land as we please (with democratically justified limits); free movement of people from land, including an unrestrained ability to sell land; and intergenerational equality. The key method property law has for preserving those values is to insist that private citizens have limited ability to create property rights; freedom of contract is not the overriding principle of land law. Citizens must deal in the default bundles that their society has decided are acceptable. In common law systems those default bundles are created by the *numerus clausus* principle (Merrill and Smith 2000) or by what Heller (1999) calls 'boundary rules'. These are the technical rules of property law that safeguard people from their fellow citizens compromising others' ability to acquire and use land. Examples of technical rules are the estates system, the four criteria for validity of easements in *Re Ellenborough Park* (1956), the touch and concern doctrine in lease law, the rule against perpetuities, and most pertinently for strata law, prohibitions on obligations on freehold land.

The prohibitions on obligations on freehold land ensure that fees simple can be exploited, socially and economically, subject only to government regulation, but free from predecessor and non-possessor control. It is not an accident that fees simple are the dominant property right in modern liberal democracies, particularly 'New World' democracies like Australia, New Zealand, the U.S., and Canada, which never had feudal systems and actively resisted the creation of a landlord class. Fees simple are the interest in land that allows citizens the greatest personal and economic freedom, foundational values of liberal democracies.

The probation on obligations on freehold land is most clearly set out in the following quote from Lord Brougham in *Keppell v Bailey* (1834), a case that considered the validity of an obligation created by a previous landowner for all subsequent owners to exclusively use a

particular railway to transport stone. Examples from strata buildings are included in brackets to illustrate the continuing relevance of the decision:

> But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given...if one man [developer] may bind his message and land [condominium] to take lime from a particular kiln [buy electricity from a particular supplier], another may bind his to take coals from a certain pit [pay for the use of an off-site gym], while a third may load his property with further obligations to employ one blacksmith's forge [management company], or the members of one corporate body, in various operations upon the premises [on-site letting agents], besides many other restraints as infinite in variety as the imagination can conceive (1408-9).

The result of *Keppell* was that current owners of a fee simple could not load land up with obligations that would bind future owners. While obligations might be socially or economically beneficial for the current landowner (or his associates), they would not necessarily be for future landowners, and so the best option was to prohibit the creation of any enduring obligations. Landowners could always incur obligations that they considered beneficial through contract. Lord Brougham was aware of the systemic effect of property rights; *Keppell* was not simply a question of a single landowner creating an obligation to use a particular railway in relation to a single piece of land. If the landowner in question was permitted to do so, all landowners could create any obligations they pleased in relation to all land, seriously compromising the efficiency of fee simple land markets.

Unfortunately, the principle in *Keppell* was quickly breached in *Tulk v Moxhay* (1848), a decision of Lord Cottenham, (ironically the barrister who had successfully argued for the invalidity of the obligation in *Keppell* (McFarlane 2013)). In *Tulk,* Lord Cottenham held that a contractual agreement never to build on Leicester Square and to maintain it as a garden bound a successor in title with notice of the promise. It is difficult to see *Tulk* as anything other than incorrect, confusing the rules of contract and property. Contract law allows parties to agree all manner of idiosyncratic obligations because the rule of privity means that only those who agreed those obligations will be bound. In contrast, as we have noted, property law requires dealing in default bundles; private citizens cannot make up their own property rights. There is room for creativity within the default bundles, most notably in leases, but there are limits. In addition to those limits, if property rights do not comply with the common law rules for formal creation, equity will only enforce those property rights against successors in title who knew or should have known about those rights. That is where notice is relevant; not to contract rights, but to known property rights that only exist in equity.

Equity considers notice as a kind of consent; if a party knew or should have known about an existing property right and acquired the land anyway, they have effectively consented to being bound. Notice is not a catch-all that allows burdens to run with land. As discussed below, in strata, the limited nature of notice has been misunderstood, with strata statutes and developers' lawyers placing inappropriate weight on notice or as it is typically referred to in the strata context 'disclosure'. Other than the anomaly of *Tulk*, property law has never considered notice to be a blanket validating factor allowing any agreement to affect land.

English courts recognised the danger of *Tulk* and quickly limited the decision to promises that related to land (not people or businesses) and most significantly, to restrictions, not positive obligations. In *Austerberry v Corporation of Oldham* (1885) the Court refused to enforce a positive obligation to repair a road against successors in title to the original covenantee. *Austerberry* remains good law in most common law jurisdictions, radically limiting the impact of *Tulk*, prohibiting the sale of freehold land burdened by on-going obligations to pay money to the original covenantee or their associates.

The U.S. took a different path in relation to freehold covenants. In an 1852 commentary on *Spencer's Case* (1583), Judge Hare decided that privity of estate existed between a vendor and purchaser of the fee, not simply between a landlord and tenant (Reichman 1981). If a promise between grantor and grantee 'touched and concerned' the land, it could bind successors in title. The promise could be positive or negative, was enforced by the common law and known as a 'real covenant'. Although the decision in *Tulk* was later incorporated into U.S. law, it became part of the triumvirate that made up 'servitudes': restrictive covenants, easements and 'real' covenants. As real covenants could be positive, the limitation of *Tulk* to restrictions was largely otiose. It was possible for landowners to impose monetary obligations on freehold land to pay for services which, after the decision in *Neponsit Property Owners' Association Inc v Emigrant Industrial Savings Bank* (1938), could be enforced by a separate legal entity made up of the collective owners of benefited land. Servitudes or 'C, C & Rs' (covenants, conditions and restrictions) became the foundation for the U.S. private communities and condominiums, which now house over 70 million Americans.

The crucial point about U.S. law is that it is rooted in the common law and equity, which remain the responsibility of judges. Although they have been described as 'an unspeakable quagmire' (Rabin 1974, 489 cited in French 1981, 1261), the technical rules of

U.S. covenant law operate as 'boundary rules', allowing courts to place a limit on the original parties' freedom of contract, invalidating obligations that are objectively socially or economically detrimental, no matter how freely agreed. The *Restatement (Third) of Property, Servitudes* (2000) attempted to clarify the 'quagmire', but did not intend "to remove courts from their historic role of safeguarding the public interest in maintaining the social utility of land resources" (*Restatement*, § 3.2(a)). Restatements are written by the American Law Institute, an organisation comprising academics, judges and practitioners, with theoretical, doctrinal and practical understanding of the law. The *Restatement* affirms courts' function of eliminating covenants that are illegal, unconstitutional or against public policy (§ 3.1), unreasonable restraints on alienation, undue restraints on trade, or unconscionable, (§ 3.4–3.7). Further, it is readily accepted that Courts have the power to strike down rules created by condominium associations that are 'unreasonable' (§ 6.7; *Hidden Harbour Estates, Inc v Norman* (1975)). It is true that U.S. courts routinely uphold covenants and rules on the assumption that they were consented to by voluntary purchase or appropriate vote, but the centrality of covenant law to U.S. homeowner associations and condominiums ensures a fundamental acceptance of the role of judges, as a form of public oversight, in determining acceptable regulation of land. There is also no confusion that condominiums and homeowner associations are a subset of land law.

Strata title legislation

As noted above, the rest of common law world maintained the prohibition on positive obligations on freehold land (with the exception of Scotland). This is a significant impediment to the mass marketing of freehold titles to strata units. If a building is subdivided into individual freehold (as opposed to leasehold) titles, orthodox property law cannot be used to impose positive obligations on titles to maintain and repair the building. Further, if low rise estates are marketed with facilities and services (gyms, pools, tennis courts, country clubs etc) orthodox property law cannot be used to impose obligations to pay for their upkeep.

These legal impediments frustrated Australian developers. In the post-WWII period, they wanted to market apartments as permanent homes to a wide section of the population, so much so that they habitually referred to strata apartments as '*home* units'. Long term urban leasehold development had been resisted in Australia across the political spectrum for over a century; like other 'New World' countries, Australian governments had no desire to see a landed class emerge. As a result, Australians associated homeownership exclusively with

freehold ownership, so developers needed to find a way to create *freehold* titles within a single building. They also wanted to build the freehold developments with extensive, private facilities that they had seen in the U.S..

To overcome the limitations in the common law and equity, developers pressured state legislatures for change; legislatures were amenable. The original New South Wales *Conveyancing (Strata Titles) Act 1961* was largely driven by Dick Dusseldorp, the director of one of Australia's largest developers, Lendlease. Dusseldorp, a Dutch engineer and survivor WWII forced labour, was genuinely concerned with urban renewal but also with increasing the availability of credit to purchase his product. Australian banks largely refused to lend money for the purchase of company or co-op title apartments and so their ownership was limited to people who could afford to buy property outright (Sherry 2017, 19). Dusseldorp sought to market apartments to the masses. He went directly to the New South Wales Attorney General, offering to draft new 'strata title' legislation, which would overcome legal impediments, and to secure institutional support for it. In return, Dusseldorp wanted the Attorney General to 'push it through Parliament'. The Attorney General replied, 'Mr Dusseldorf that would be the easiest piece of legislation ever achieved! But what do you want from me?' (Clarke, 1995, 178-9). What Dusseldorp wanted was a luncheon of all the key players of urban development, at which the Attorney General would express support for Dusseldorp's legislation. Significantly, lawyers were banned; only Chairs and managing directors were to be invited.

The luncheon occurred in March 1959 and the Attorney General gave his support as promised. Dusseldorp then sent a strata title bill to the government, drafted by his legal counsel, John Baalman, barrister, and until the previous year, New South Wales' Chief Examiner of Titles. The draft bill was considered for eight months by a committee instigated, supervised and paid by a consortium of property developers, which as Kondos (1980, 335) notes "was a remarkable arrangement, to say the least, in the law-making process of any society." The result was the *Conveyancing (Strata Titles) Act 1961* (NSW) which became the model for strata/condominium statutes around the world, including New Zealand, Singapore, Malaysia, the Canadian provinces of Victoria, British Columbia and Alberta, and parts of the Caribbean.

This process of developer involvement in law making was not unique to New South Wales. Ten years later, Queensland passed Australia's first legislation facilitating low-rise,

U.S. homeowner association-style developments. The Minister for Justice's Second Reading Speech was taken almost word for word from a letter sent to the Queensland Law Commission by the lawyers of the state's biggest developer (Sherry 2017, 27). The developer had been using complicated easement and company structures to create housing estates with common facilities, and they and their lawyers were keen to see a simpler legislative scheme. The Queensland legislature obliged with the *Group Titles Act 1972* (Qld), which along with successive Acts, facilitated the construction of thousands of low and high-rise body corporate estates with extensive facilities.

Even if some developers like Dusseldorp were genuinely interested in good urban development, the risks of this legislative path are obvious. Developers are legitimately interested in short-term profit and their lawyers are paid to serve those ends. Parliamentarians are elected to serve the public interest and should moderate the demands of lobbyists, but this presupposes that they understand the consequences of what they are being asked to enact. Property theory and values embedded in traditional land law, described above, are relatively difficult even for lawyers, and it would be fair to say that the level of understanding of some parliamentarians responsible for Australia's early legislation was profoundly inadequate.

By way of example, the first US-style mixed residential and tourist development in Australia was facilitated by its own Act of Parliament, the *Sanctuary Cove Resort Act 1985* (Qld). Speaking in favour of the Bill was the Minister for Local Government, Main Roads and Racing, popularly known as the 'Minister for Everything'. He was later charged with serious fraud in relation to property development but died before trial. The Minister said,

> provisions are based upon existing Canadian and American condominium resort legislation… The important thing to recognise at an early stage is that legislation of this type is not new in the global context. It is only new to Queensland and Australia… The primary mechanism used for controlling such developments in the American scene is by way of imposing constraints, covenants on title, and restraints on the developments. As this House will appreciate, the concept of covenants on title is unacceptable to this Government, and this legislation is designed to allow development to be proceeded without the imposition of such encumbrances, (Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 1985, 2190 (Hinze)).

What neither the Minister nor the House seemed to appreciate was that the legislation had to have exactly the same effect as 'covenants on title', otherwise it would not have facilitated US-style development that developers wanted to copy. Like U.S. real covenants, the *Sanctuary Cove Resort Act*, as with all strata/condominium legislation, allowed the imposition of positive monetary obligations on freehold titles, binding all owners through levies. In addition, the legislation gave developers the power to create a raft of rules restricting and compelling particular activities on collectively and individually-owned land. Unlike the U.S., these are not servitudes with judicially limited content, they are by-laws, created by developers or subsequent owners, that only need to relate to the 'use or enjoyment' of a lot or common property.[1] There is little legislative limit on this rule (Sherry 2017, 31-33). To illustrate its breadth, a by-law banning people eating meat in their unit would relate to the use of a lot. Finally, the legislation creates a body corporate (the equivalent to a condominium corporation or association in North America), and when initially controlled by the developer, it can be made to enter long-term contracts, payable by the ultimate lot owners. These three key aspects of strata/condominium legislation – levies, broad by-laws, and a body corporate – has allowed a current landowner (the developer) to do a range of things prohibited by property law for centuries. However, because parliamentarians, developers, and possibly even their lawyers, did not understand the function of prohibitions on freehold land, they readily overrode the prohibitions with legislation. Further, in contrast to the American Law Institute, an organisation comprising judges, academics and legal practitioners, Australian state parliaments seem unaware of judges' role in moderating private citizens' power to regulate land or if they were aware in other contexts (for example, easements and freehold covenants), they neglected to discern a connection with strata title. As a result, the legislation gives courts little power of review. Australian courts have been reluctant to craft their own limits, continually reaffirming the wide permissible content of by-laws.[2] Strata title has been persistently viewed by lawyers, legislatures and even judges, as a discrete, statutory law unto itself, rather than a form of land law.

[1] All Australian states have model by-laws in the legislation, but there is no compulsion to use them. Developers frequently write bespoke by-laws, and communities change their by-laws by special majority vote.
[2] *White v Betalli & Anor* (2007); *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* (2011).

The consequences of legislatively-based strata development

First, some consequences of a legislative basis for strata developments are positive. In Australia, unlike the U.S., a body corporate is automatically created on the registration of a strata plan of subdivision, comprising all owners of the individual lots. A body corporate does not have the powers of a natural person, only the powers expressed or implied by the Act. Voting, meeting procedure, finances and insurance are all set by the legislation, and are the same for every body corporate, providing certainty and protection to owners and tenants. In contrast, in the U.S., associations are created by developers' lawyers and their forms vary (Hyatt and French, 2008: 31-33), as well as their powers and procedures. There is much greater freedom to establish the 'constitutional' structure of a community in the U.S. than in Australia, a freedom that caused considerable problems in the early days of U.S. homeowner association development with inexperienced developers and lawyers creating unsustainable structures (Hyatt, 1981).

Interestingly, the *Conveyancing (Strata Titles) Act 1961* NSW originally gave much greater powers to the body corporate by placing a range of matters in the First Schedule by-laws, which could be altered by unanimous vote. These included the obligation to control and manage the common property; maintain it; and the constitution of the executive, quorum, meeting procedures, and voting. When the legislation was re-enacted as the *Strata Titles Act 1973* (NSW) these matters were moved from the alterable First Schedule into the body of the Act. Presumably, a decade of experience had suggested that foundational aspects of finances, governance, and property management should not be subjectively determined by private citizens, even if voluntarily agreed. On the contrary, baseline issues that affect peoples' finances and lives by virtue of their unavoidable ownership or residence of land should be determined objectively by government. However, globally, the genie was out of the bottle; many jurisdictions had copied the original 1961 New South Wales Act and retain power for the body corporate to alter constitutional matters contained in the First Schedule.

Despite the regulatory power that legislation exerts over strata schemes, the notion of freedom of contract still pervades Australian Acts. Diversity and freedom of choice undeniably have a place in strata title. A high-rise building with 800 residents will need different regulation from a duplex strata scheme or a low-rise residential estate. However, in the context of land, freedom of contract needs strict limits for the reasons set out at the beginning of the chapter. Land is a finite and essential resource. We have no choice but to acquire a home, and because of the physical limit of land, our incomes, ties to family and

community, no one has unlimited choice. Thus, the act of purchase or renting cannot necessarily be equated with consent. Giving people 'notice' of all the obligations and restrictions associated with land does not change that. They still must acquire homes from the marketplace, which for strata buildings can be remarkably limited.

Further, as any property theorist could attest, private citizens are capable of agreeing all manner of things in relation to their own land that will harm successive owners. It is one of the key rationales for the *numerus clausus* system. So, what happens when this protection is swept away?

Queensland's management rights industry provides a good illustration. The state's strata title legislation reads like a commercial contract drafted by a developer's lawyer. Sections 112-117 of the *Body Corporate and Community Management Act 1997* (Qld) enshrine a developer's right to sell contracts for the management of a scheme and the letting of lots, to the exclusion of the ultimate unit owners. This means that under express legislative authority, when the developer controls the body corporate as original owner of all lots, it can cause the body corporate to enter into a contract with a management company and/or letting agent (often related to the developer). The management company/letting agent pays the developer for this contract. Initial sale prices to developers are hard to ascertain, but they need external financing, and on-sale prices of management businesses give some indication of market value ranging from $Au 200,000 - $ 6 million (ORP, 2011-2012, 4). Section 112(2) of the Act requires the developer to exercise 'reasonable skill, care and diligence and act in the best interests of the body corporate, as constituted after the original owner control period ends' when signing these contracts. If the scheme includes holiday accommodation, the management contract can be 25 years long, and managers or letting agents often own a lot or a reception desk, living and working onsite.

The legislation relies heavily on the concept of 'disclosure' to legitimate this practice. Section 212(2)(c) of the Act requires a developer to provide purchasers with a disclosure statement setting out the 'terms of the engagement' of a manager and letting agent, including the estimated costs to be borne by the individual unit owner. The rationale is that if a purchaser has been told about the management or letting contract and decided to buy, there can be no objection to them being bound by that contract as a member of the body corporate.

There are two fundamental flaws in management rights rationale. First, 'disclosure' uncritically imports a corporate law concept into land law. The hybrid legal nature of strata

schemes has been noted (Hyatt and Rhoades 1976), with corporate law rightly exerting some influence. However, strata schemes are ultimately not companies. They are land, most commonly homes, and need to be analysed within the rubric of land law. 'Notice' in land law is the analogous concept to disclosure, and while disclosure and notice have a common moral rationale (binding someone with matters of which they had full knowledge), there is a fundamental difference. In corporate law, an almost unlimited range of things can be the subject of disclosure, while in land law, for good reason only known property rights can be the subject of notice. A failure to recognise what can legitimately be the subject of notice was the mistake Lord Cottenham arguably made in *Tulk*, and from which English courts were forced to back-track. Developer-made body corporate contracts offend two foundational principles of private law: they effectively allow the burden of contracts to be assigned, and positive and other obligations to run with freehold land.

Second, disclosure statements that give notice of obligations in off-the plan unit sales are ironically both voluminous and incomplete. Developments are often large, requiring the disclosure of the legal and physical details of more than one scheme. However, because schemes are physically and legally incomplete at the point of contract, disclosure statements are full of words like 'indicative', 'proposed', 'typical', and 'concept'.[3] In Queensland, disclosure of the final form of management and letting contracts is not mandatory, only disclosure of the 'terms of the engagement'. Whether these documents constitute genuine disclosure/notice and then genuine purchaser consent, is questionable.

Not surprisingly the real-world sale of management rights works like this: the longer the management contract and the more it allows the management company to charge the body corporate, the more the management company is prepared to pay the developer. The management company starts the performance of the contract in considerable debt (ORP, 2011-2012, 12-13), and the ultimate lot owners inherit a contract that disproportionately reflects the management company's needs, not their own. Neither the statutory standards nor disclosure have provided sufficient protection. Litigation, dissatisfaction, and dispute are rife (Sherry 2017, 134-5). Developers seem to be the only satisfied parties.

[3] See for example, *Vennard v. Delorain P/L as Trustee for the Delorain Trust* (2010; *Gough & Ors v South Sky Investments Pty Ltd* (2012).

None of this is surprising to orthodox property law. Body corporate contracts are simply positive obligations on freehold land by another name. These contracts are no different from the obligation to use a specific railroad in *Keppell*. As was obvious to Lord Brougham over a century ago, the risk is that the original obligation will have been agreed for the benefit of the original owner/his associates or even if it was thought to be objectively beneficial for all subsequent owners that may prove incorrect. Judges are aware of the lack of altruism and foresight on the part of landowners, which is why most common law systems have prohibited positive obligations on freehold land outright or as is the case in the U.S., limited them to those that 'touch and concern' the land. While the 'touch and concern' doctrine obviously does not eradicate all obligations for successive owners to pay for goods or services set in place by predecessors in title, it opens the door to eradicate some. For example, the obligation to buy water from a supplier was held not to 'touch and concern' the land in *Eagle Enterprises, Inc v Gross* (1976). The logic is not overwhelming; access to water is obviously necessary to use land. However, the new landowner had sunk his own well, and the 'touch and concern' doctrine was being used to prevent a socially and economically undesirable burden; that is, compelling a landowner to buy a service he did not need.

Developer-made association contracts, which are the equivalent of positive obligations on freehold land, were initially common in the U.S. condominium industry, but they, along with a range of other abusive developer practices almost caused the industry to collapse in the early 1970s (HUD 1975; Sherry 2010). The Federal and some state governments began to enact legislation to tackle developer-made contracts, initially relying on the concept of disclosure, but this ultimately proved ineffectual. Recognising the limits of disclosure, section 3-105 of the *Uniform Common Interest Ownership Act* 1982 ultimately stipulated that management and employment contracts, recreational and facilities leases, created by the developer, can be terminated by the association on 90 days' notice. While the adoption of the *Uniform Act* is inconsistent, the practice of developer-made contracts seems to have been consigned to history in the U.S.. The management industry is alive and well, but companies negotiate with the parties who will be paying for their services, the ultimate property owners. Of course, these also constitute burdens on land which bind successive owners, but having been created by land-owners in the same position as successive owners – homeowners, as opposed to a developer – they have a much greater chance of genuinely benefiting current owners.

Of course, the *Uniform Act* provision on developer contracts is an example of legislation, not the common law, controlling developer practice, but it has its genesis in common law values, that is, an understanding of the dangers of predecessor control. The argument here is not that the U.S. law of servitudes eradicates all poor developer practice. Rather, the argument is that because U.S. development is rooted in the common law, judges and legislatures do not treat condominiums and homeowner association law as a novel, discrete area unto itself. It is a subset of land law, and the lessons of the common law are relevant.

The culture and history of land law: Australia vs. U.S.

Readers might be surprised to see the law of the U.S. held up as an example for condominium governance. After all, as McKenzie so masterfully documented in *Privatopia*, U.S. homeowner associations often constitute 'an ideology of hostile privatism [where] preservation of property values is the highest social goal, to which others aspects of community life are subordinated' (McKenzie 1994, 18-19). However, as noted at the beginning of the chapter, land law is a product of social, cultural, political, and economic values. While many countries share an English common law history, the common law is utilised by citizens, judges and legislatures in ways that reflect a country's own history and cultural values.

Australia and the U.S. share common and divergent histories. Both are First Nations invaded by colonising European forces. However, that process of invasion differed sharply. The U.S. was in part, 'settled' by religious extremists wanting to create a new society run according to their own values (Philbrick 2007). In contrast, Australia was a penal colony, involuntarily 'settled' by the population of British and Irish jails. The U.S. fought a War of Independence, freeing themselves from the British Crown, creating a legacy of pervasive distrust of large government, intensified by late 20th century neo-liberalism. In contrast, Australia has never entirely thrown off the mantle of the British Crown. We remain a member of the Commonwealth, and distrust of government has never been a national trait.

These historical and cultural factors affect how citizens use land law. Private communities with their own tailored rules have proliferated in the U.S., creating thousands of small societies run in accordance with their own values (Ellickson 1981; Alexander 1989; Nelson 2005). This predilection for creating land-related rules coupled with a well-recognised judicial power to adjudicate on those rules has produced considerable judicial and academic

debate, (Sherry 2017, 73-120). There is no assumption that notice and consent provide a complete answer to whether burdens on land are legitimate. Paradoxically, an enthusiasm for rules and small group autonomy has led to a greater awareness of their dangers.

In contrast, Australians do not have a predisposition for small group autonomy, and while we have a racist colonial history, it does not include racial segregation achieved through private property law.[4] As a result, developers, lawyers, and legislatures were arguably naïve about the risks of private citizen control of land. Today, U.S.-style homeowner associations only make up a small share of the housing market, but because of state urban consolidation policies, strata development has grown exponentially. The result is that developers and millions of private citizens now have the power to control other people's land and lives through the body corporate and by-laws, and there is an astonishing lack of legislative or judicial limit on those powers.

To a degree, Australians have been protected from these powers by their own reticence to use them (apart from developers, who are enthusiastic about the powers acquired through the strata form). By way of example, the New South Wales Supreme Court has long confirmed that bodies corporate can ban smoking inside private lots, even when there is no smoke drift or effect on others (*Salerno v Proprietors of Strata Plan No 42724* (1997)), because a by-law banning smoking relates to the use of a lot. Despite this clear authority, Australian bodies corporate almost never ban smoking inside people's units. Rather, they only ban smoking on common property or in private lot areas like balconies that create smoke drift, harming others. Body corporate actions in this area are more consistent with the core democratic value of negative liberty, than their actual powers pursuant to strata legislation.

The two areas in which Australians have not been protected from themselves are short-term rentals such as Airbnb and pets. By-laws banning both are common, and because they profoundly affect people's social and financial well-being, such bans have been the subject of much litigation. Unfortunately, none of the case law has identified the core issue at stake: the legitimacy of non-possessor control of land, an issue that land law has been wrestling with for centuries. Arguably, it is not legitimate for non-possessors to decide if someone else can keep a cat in their own home, nor is it legitimate for non-possessors to decide to whom others can legally lease their land (that being a question of public planning

[4] Australia has a history of racial segregation in the forced relocation of Indigenous people to missions and reserves, as well as laws that controlled their freedom of movement, (Reynolds, 1989, 182–214).

law, whose failure is the real source of Airbnb disputes). The fact that those rules may have been voluntarily agreed by a majority does not change that. As Rose (1981, 1404) observed when the U.S. attempted to simplify their servitude law, when 'devising new strategies in an old war among generations of land owners… we should not be overly surprised if we wind up in some of the same old trenches'. The source of many disputes in strata title schemes is the failure of the architects of legislation to recognize that they were creating a system on non-possessor control, against the grain of centuries of land law. While some control is legitimate (e.g., raising levies for maintenance and repair), some, such as developer-control and by-laws, needs robust limits.

Recently, there have been flashes of legislative and judicial recognition of the problems associated with non-possessor control. In the latest re-enactment of the New South Wales legislation, body corporate by-laws that are 'harsh, unconscionable or oppressive' are for the first time prohibited, (unreasonable by-laws are apparently still acceptable).[5] In Victoria and the Australian Capital Territory (ACT), courts and tribunals have recently clarified the power to write by-laws in relation to private lots. In *Owners Corporation PS501391P v Balcombe (Owners Corporations)* [2015], the Victorian Supreme Court held that by-laws could not ban short-term letting because the by-law power did not extend to regulating the lot use, and bodies corporate should not effectively play the role of public planning authorities. In *The Owners – Units Plan 928 v Cochaud* [2017], the ACT Civil and Administrative Tribunal came to an even stricter conclusion that the body corporate's functions only related to managing common property and not to any aspect of private lots. However, these decisions are very much the exception. Astoundingly, Senior Member Robinson's decision in *Cochaud* is the only judicial decision in Australia to expressly acknowledge privacy and human rights implications of allowing private citizens to regulate their neighbours' homes. In other words, she is the only judicial officer, adjudicating on strata title, to recognise what land law has recognised for centuries: that land is an essential and finite resource; that private landowners can make agreements in relation to land that harm others, including successors in title; that notice and/or consent do not legitimate all agreements in relation to land; and that there must be public oversight in the form of limiting legislation and judicial review.

[5] *Strata Schemes Management Act 2015* (NSW), s139(1).

Conclusion

The rules of physics are the same the world over, and as a result, property developments are physically globally consistent. However, the rules of law differ considerably, in accordance with a country's history, politics and culture, even when countries share a common legal history, such as the English common law. Thus, developers must find different legal solutions when constructing the same kinds of developments in different jurisdictions.

As a result of the anomalous permissibility of positive covenants on freehold land in U.S. law, the U.S. had a head start on the rest of the world when building developments that depended on monetary contributions and rules. Because these developments rely on the common law, which is the responsibility of judges, and perhaps because Americans are so enthusiastic about small communities run in accordance with their own idiosyncratic values, the U.S. judiciary has considerable experience adjudicating on the legitimacy of private regulation of freehold land. While there might be debate about the correctness of specific decisions, the almost universal acceptance of the necessity for judicial oversight (cf Epstein 1981) is to be admired.

In contrast, most of the common law world prohibits positive covenants on freehold land and had to devise different solutions to the problem of maintenance and regulation of modern high rise and master planned development. As a result of their feudal history, England and Wales continued to use long term leasehold, from which they are now trying to break free (Law Commission 2018), while jurisdictions with political objections to a landed class, such as Australia, resorted to special legislation. Legislation was drafted by parliaments, but at the behest of developers, and as a result reflects developers' concerns, rather than the foundational values of orthodox land law. Most significantly, legislation does not adequately reflect an understanding of the dangers of predecessor and non-possessor control, a centuries old battle in land law. That is, a recognition that previous owners (long dead ancestors, feudal overlords and developers) and people who do not live in a specific property (long dead ancestors, feudal overlords and associations) can create all manner of rules and obligations that serve their own needs, and not those of the current possessor (unit owner). Because unit owners are the inheritors of liberal democracies and a general land law system that reflects its values, they are frustrated when their legitimate expectations of freedom, autonomy and privacy are flouted by the strata title form. For example, their freedom to choose by whom and how their building is managed; their freedom to keep a pet that disturbs no one; and their freedom to lease their property subject to zoning.

Countries like Australia which were at the forefront of enacting strata legislation need to accept that strata title is more complex than initially anticipated. The current New South Wales legislation is twenty times the length of the original 1961Act reflecting attempts to combat problems that were always obvious to orthodox property law, in particular the risk that in regulating freehold land under the guise of freedom of contract, private citizens will create obligations that are economically inefficient or socially unfair. Until lawyers and law-makers recognise this risk, and accept that we need robust public oversight of strata title powers, we will continue to see strata developments riddled with frustration and dispute.

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