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How Indefeasible is Your Strata Title? Unresolved Problems in Strata and Community Title

Abstract
Nothing sets my teeth on edge like a real estate sign screaming 'Oversized Torrens Title Townhouses'. What else could they possibly be? Brand new townhouses on Old System titles? Not likely. So why do real estate agents use the term Torrens in their marketing? Because what they in fact mean by 'Torrens Title' is 'not strata title' and 'not community title'. Of course, strata and community title are Torrens title, but what agents are trying to convey is that the townhouses do not have titles burdened by the restrictions, obligations, social and legal complications that come with ownership of strata or community title.

Keywords
strata title, community title, indefeasibility

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HOW INDEFEASIBLE IS YOUR STRATA TITLE? UNRESOLVED PROBLEMS IN STRATA AND COMMUNITY TITLE

CATHY SHERRY*

I Introduction

Nothing sets my teeth on edge like a real estate sign screaming 'Oversized Torrens Title Townhouses'. What else could they possibly be? Brand new townhouses on Old System titles? Not likely. So why do real estate agents use the term Torrens in their marketing? Because what they in fact mean by 'Torrens Title' is '*not* strata title' and '*not* community title'.[1] Of course, strata and community title *are* Torrens title,[2] but what agents are trying to convey is that the townhouses do not have titles burdened by the restrictions, obligations, social and legal complications that come with ownership of strata or community title.

A primary complication of strata and community title is the existence of by-laws, the private rules that govern the scheme. By-laws must be registered at the inception of the development,[3] but can be altered thereafter by an appropriate vote of the

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1 In New South Wales, strata title typically refers to high rise development under the *Strata Schemes (Freehold Development) Act 1973* (NSW) (*SSFDA*) and the *Strata Schemes Management Act 1996* (NSW) *(SSMA)*. Community title typically refers to low rise master planned estates under the *Community Land Development Act 1989* (NSW) (*CLDA*) and the *Community Land Management Act* 1989 (NSW) (*CLMA*). However, community title developments might also include high rise buildings, bringing all four pieces of legislation into play. There is also a *Strata Schemes (Leasehold Development) Act 1986*.

2 *SSFDA*, s 7, only 'land', defined as 'land under the *Real Property Act 1900* held in fee simple (other than land comprised in a qualified or limited folio of the Register)' can be subdivided by the registration of a strata plan. Only 'land', defined in s 3 *CLDA* as 'contiguous land held under the *Real Property Act 1900* in fee simple, no part of which is land in a qualified or limited folio' can be subdivided pursuant to s 5 *CLDA* by the registration of a community plan.

3 SSDA, s 8(4B) and CLDA, s 5(4)(a) and Schedule 3.

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scheme's governing body.[4] By-laws bind all owners, occupiers, lessees and mortgagees, as well as the governing bodies of the scheme.[5]

There is little limit on the content of by-laws. Strata by-laws must be for the purpose of 'the control, management, administration, use or enjoyment of the lots or the lots and common property',[6] while community title management statements may include by-laws that relate to both community property (common property) and individual lots.[7] However, both the *SSMA* and the *CLDA* state that by-laws are not limited to subject areas listed in the legislation.[8] Further, there very few matters that are expressly prohibited to be included in by-laws,[9] although s 43(4) *SSMA* states that a 'by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law.'[10]

In effect, the ability to write by-laws for strata and community title schemes is very wide.[11] At one end of the spectrum, a by-law may simply stipulate where people are

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4 SSMA, s 47 and CLMA, s 14. In *Pivotal Point Residential* [2008] QBCCMCmr 55, in reply to the argument that a pet by-law could not be altered as the owners had bought on the faith of an original by-law permitting pets, the Adjudicator said, 'However, even if by-laws result in a statutory contract arising individually between the applicant and the body corporate, I do not accept the submissions to the effect that the body corporate is unable to alter this individual contract. This is because the legislation specifies procedures by which the by-laws can be changed *(Act 62(3), 179)*. Therefore, despite the by-laws taking effect as if they are mutual covenants signed under seal *(Act, 59),* the existence of specific procedures allowing for a change of by-laws weighs heavily against a view that the original by-laws form a special or individual contract that is unalterable *(Act 62(3), 179)*.'

5 SSMA, s 44 and CLMA, s 13.

6 SSMA, s 47.

7 *CLDA*, Schedule 3, cl 2 and 3.

8 *SSMA*, s 43(1) and (2) and *CLDA*, Schedule 3, cl 3(1) and (2).

9 *SSMA*, s 49 states that a by-law cannot prohibit or restrict the devolution of a lot or a transfer, lease, mortgage, or other dealing relating to a lot and it cannot restrict children or guide dogs occupying lots. *CLDA*, Schedule 3 designates limited prohibitions or restrictions that must not be included in a management statement, those that affect disability assistance animals, those that would exclude public housing or those based on 'race or creed, or on ethnic or socio-economic grouping'.

10 Cf CLDA, Schedule 3(1)(b), a management statement must not be inconsistent with an Act or law that, by the operation of section 116 of the CLMA, applies to any part of the community property that is an open access way and s 14(2)(b) CLMA, a management statement must not be amended to be inconsistent with the CLDA or CLMA.

11 Santow J in *White v Betalli* [2007] NSWCA 243 at [42] said that 'the strata titles legislation indicates, a broad capacity under that legislation to create by-laws, subject only to there being no incompatibility or inconsistency with any Act or law'. See also Sherry, C. 'The

to store their garbage bins, in the middle a by-law may limit a use of a lot,[12] and at the far extreme, it may amount to the taking of a vested property right. It is this far end of the spectrum that is the subject of this article. It asks the question, if by-laws passed without unanimous consent[13] can effectively be used to divest owners of a proprietary interest, how indefeasible is their title?

II Exclusive-use by-laws and the loss of common property

Strata and community title legislation both provide mechanisms for exclusive use of common property to be given to individual lot owners. On a practical level this may make sense. For example, while a roof terrace might fall outside the penthouse lot, as defined by the strata plan,[14] and thus be common property,[15] it may only be physically accessible by the owner of the penthouse. In a mixed use strata scheme with commercial lots at its base and residential lots in the tower, the commercial lots may never need to access the lifts. Further, if some lot owners never use parts of the common property and others use it exclusively, it seems fairer that the latter pay for its maintenance, rather than the cost being shared between all owners as would be the norm.[16]

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legal fundamentals of high rise buildings and master planned estates: Ownership, governance and living in multi-owned housing with a case study on children's play' (2008) 16(1) *Australian Property Law Journal* 1-23.

12 The following by-laws have all be held to be valid: *Salerno v Proprietors of Strata Plan No 42724*, (Unreported Judgment, Supreme Court of New South Wales, Windeyer J, 1 April 1997, 8 April 1997) (by-law prohibiting smoking in a lot which would prevent the owner leasing the premises to a club); *Sydney Diagnostic Services v Hamlena Pty Ltd* (1991) 5 BPR 11,432 (by-law prohibiting use of lot for any purpose other than medical practice, excluding pathology); *Bapson v Puyeti Pty Ltd* (1990) NSW Title Cases 80-0002 (by-law limiting Asian food outlet to one lot in scheme).

13 In most cases, a special, not unanimous resolution is needed to change by-laws: SSMA, s 47 and CLMA, s 14(3)(c).

14 The boundaries of a strata lot are set at the date of registration of the strata plan. Typically, they are the inner surfaces of the walls, the under surface of the ceiling and the upper surface of the floor: *SSDA*, ss 8 and 5(2)(a) and *The Owners SP 35042 v Seiwa Australia Pty Ltd* [2007] NSWCA 272.

15 Any land that does not fall within a lot is common property: *SSDA*, s 5 cf *CLDA*, s 3, which states that 'community property means the lot shown in a community plan as community property.' Community property is the equivalent of common property in a strata scheme.

16 The owners corporation has a statutory duty to 'properly maintain and keep in a state of good and serviceable repair the common property': *SSMA*, s 62 and *Lin & Anor v The Owners - Strata Plan No. 50276* [2004] NSWSC 88, as does an association in a community scheme: *CLMA*, Schedule 1, cl 4. At each annual general meeting, the owners' corporation must estimate how much money it needs to discharge this duty: *SSMA*, s 75 and

Section 52, *SSMA* provides that an owner's corporation may make, repeal or amend an exclusive-use or special privileges by-law with a special resolution and 'the written *consent of the owner or owners of the lot or lots concerned*', [my emphasis]. Section 54 *SSMA* stipulates that such a by-law must provide for the maintenance of the area by specifying if the owner's corporation will continue to be liable for its maintenance and repair or imposing that obligation on the lot owners concerned. An exclusive-use by-law that fails to do so is invalid.[17]

Strata lawyers tend to treat exclusive-use by-laws as a way of formalising rights which may be economically beneficial to individual lots and equitably allocating maintenance fees. However, Santow J in *Young & 1 Ors v The Owners S/P 3529 & 2 Ors*[18] recognised the profound implications of exclusive-use by laws, in particular, their expropriatory quality for lot owners who lose, rather than gain rights to common property. On registration of a strata plan, common property vests in the owners' corporation as agent for the lot owners as tenants in common.[19] Unity of possession, a fundamental attribute of co-ownership, means that lot owners are entitled to occupy the whole of the co-owned property.[20] When an exclusive-use by-law is passed, owners who are not beneficiaries of the by-law lose their right as tenants in common to occupy the whole of the common property. The question raised in *Young* was whether these owners' consent was needed.

The case involved a strata scheme in which the plaintiffs owned two lots. Unusually, those lots were garages, not apartments. The defendant owners' corporation sought to pass a by-law granting exclusive use of the swimming pool to residential owners. They had obtained the written consent of the owners being granted the exclusive use, but not the plaintiffs. The owners' corporation argued that while under the earlier

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subsequently levy owners in proportion to their unit entitlement: *SSMA,* ss 76, 78. A community association must do the same: *CLMA*, s 20 and schedule 1, cl 12, 13.

17 *Owners – SP 62515 v Gormick Constructions P/L (Strata & Community Schemes)* [2006] NSWCTTT 36.

18 [2001] NSWSC 1135.

19 Sections 18 and 20 SSFDA; *CLDA,* s 31; cf s 35 BCCMA.

20 *Bull v Bull* [1955] 1 QB 234; *Commonwealth Bank of Australia v MacDonald* [2000] NSWSC 553 (Unreported, Supreme Court of New South Wales, Young J, 21 June 2000) [33]-[40] and D Mendes Da Costa, 'Co-ownership under Victorian Land Law' (1961) 3 *Melbourne University Law Review* 137 at 150-1, 167.

legislation unanimous consent had been required to an exclusive-use by-law,[21] changes in 1987 meant that only a special resolution[22] was needed, along with 'the written consent of the owner or owners of the lot or lots concerned'.[23] They argued that the 'owners concerned' were those who were to acquire new rights and on whom extra maintenance obligations would be imposed.

The defendants' argument was a plausible interpretation of the legislative provisions.[24] It seemed to be supported by the Minister's second reading speech[25] which explained the amendments as an attempt to remove 'unnecessary regulation' and to keep the Act 'in step with industry practices'. The Minister referred to the need 'to remedy an increasing problem whereby special services are being provided to only some proprietors – for example, an air-conditioning system servicing a ground floor shopping arcade – are being paid for by all proprietors' [sic]. She went on to state that '[t]he proposals also include a number of measures to protect the interests of both individual proprietors and bodies corporate. The first is that for such a by-law to be valid, the body corporate must first obtain the written consent of the proprietors who will be given the exclusive use of the common property. This provides a proprietor with a safeguard against unknowingly being given responsibility for the maintenance of common property.'[26]

Santow J reasoned that the Minister was only giving one example of when consent would be necessary rather than suggesting that these were the exclusive

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21 Section58(7) *Strata Titles Act 1973* provided that 'a body corporate may, with the consent in writing of the proprietor of a lot pursuant to an unanimous resolution make a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part thereof…'.

22 SSMA dictionary and Schedule 2, Part 2, clause 18 (2) and (3).

23 Cf s 171(2) *Body Corporate and Community Management Act 1997* (Qld) (BCCMA) which requires a resolution without dissent for the passing of an exclusive-use by-law, along with the consent of the owners of the lots to which the exclusive-use by-law will attach. Under s 105(3) a resolution is one without dissent 'only if no vote is counted against the motion'.

24 Young CJ in *Chauhan v Jaynrees Services Pty Ltd* [2008] NSWSC 969 said that 'lots concerned' in s 52(1) meant, 'The lots in which special privileges relate to under the by-law, and in this case of course that means lot 3'. Lot 3 was the lot that had the benefit of the by-law in that case. This comment was only *obiter* and it is possible that if the matter were fully argued, Young CJ would decide differently. McColl JA made a similar *obiter* comment indicating a lack of need for unanimity in *Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 at [46].

25 Cited in *Young,* above n 18 at [28].

26 Cited in *Young,* above n 18 at [28].

circumstances in which consent would be needed. He held that a construction of the legislation which did not require the consent of those who would be stripped of rights, as well as those who would gain rights, was 'absurd and unreasonable'. He held that the reference to the written consent of lot owners 'concerned' in s 52(1)(a) must include those who would lose rights to common property. However, Santow J acknowledged that it was possible for the legislature to take away property rights without compensation, despite a strong legislative presumption against such a reading of a statute.[27] He further noted that the 1987 change from a unanimous to a special resolution was intended 'to liberate owners corporations of the veto power of the vexatious lot holder'[28] and that that there may be circumstances when the consent of some lot owners, who would not be affected by the by-law, would not be required.

Young is a good example of a problem with strata legislation. Much attention has rightly been directed to writing laws that facilitate harmonious living, but perhaps insufficient attention given to how these laws interact with fundamental principles of property. In general property law, tenants in common can create rights to exclusive possession, but only by agreement of all. One or a group of tenants in common cannot take another's rights for themselves. If it is not possible for tenants in common to take each others' property without consent, can the legislature authorise such taking? If the answer to that question is yes, *should* the legislature do this? In other

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[27] Santow J at [19] citing *Clissold v Perry* [1904] HCA 12; 1904 1 CLR 363. See also *Lin v The Owners – Strata Plan No.50276* [2004] NSWSC 88. The plaintiff lot owners sought an injunction to compel the owners' corporation to allow them to connect improvements in their lots to the common exhaust ventilation system. The owners' corporation argued that the system was already overloaded and that it was entitled to refuse permission as it had the statutory obligation of managing and controlling the common property under s 61 SSMA. Gzell J's starting point, at [8]-[9], was that lot owners had an equitable interest in the common property as tenants in common and that as such, they were entitled, concurrently with one another, to possession of the property, with none being entitled to turn the others out. Gzell J went on to acknowledge at [23]-[25] that there was 'a tension in the legislation between the rights of lot owners as the equitable owners of the common property and the rights of control, management and administration of that property by the owners corporation as the legal owner', but that it was implicit in the exclusive-use by-law provisions of the Act and the decision in *Young*, that this power of control and management 'did not extend to overriding the proprietary right that a lot owner [had] in the common property.' While the owners corporation could exercise its power of management and control by requiring a lot owner to bear the cost of connection of a hood to the system or dictate when the work could be carried out, it could not refuse access altogether as this would be 'wrongful interference with their proprietary right': Gzell J at [56].

[28] Santow J at [41].

words, in liberal democracies should the legislature empower private citizens to take the property of another?

Lest this question seem fanciful, an explanation of the 'restricted property' provisions of the *Community Land Management Act 1989* (NSW) (*CLMA*) is in order. 'Restricted property' is the community title equivalent of an exclusive-use by-law and allows exclusive use of property and exclusive obligations for its maintenance, to be given to individual owners or a subsidiary scheme.[29] These rights might be in place at the inception of the development, however, restricted property rights can subsequently be created or amended by special,[30] not unanimous resolution.[31] Further, the legislation provides that the restricted property by-law may not be made 'without the written consent of each person entitled by the by-law to use the restricted property'.[32] Unlike its strata equivalent, it would be impossible to read this provision as requiring the consent of those who will lose rights to common property as a result of the by-law.

So, imagine a waterfront master planned community with houses fronting the water and others behind. There is a boardwalk between the waterfront houses and the water which forms part of the association property (common property in a community scheme). A purchaser acquires a non-waterfront lot imagining moonlight walks on the boardwalk, only to subsequently have his security and privacy conscious neighbours pass a special resolution creating a restricted property by-law in their favour, excluding him from the boardwalk. The owners acquiring rights have magnanimously consented, as required by the legislation, while our lot owner who has lost a valuable interest in land has no power of veto. Is it possible for the legislature to authorise such a taking of private property by fellow citizens?

The answer to this question, disturbingly, might be 'yes'. The High Court's recent consideration of expropriation of native title rights in *Griffiths v Minister for Lands, Planning and Environment*[33] demonstrated just how thin the protection afforded to

[29] CLMA, s 54 and CLDA, Schedule 3, cl 6. A subsidiary scheme in a community title development can be a precinct, neighbourhood or strata scheme. It may make sense for a neighbourhood or strata scheme to have their own pool and one way to achieve this is by granting that scheme restricted property rights.

[30] *CLMA*, s 3.

[31] *CLMA*, s 54(5) and s 14.

[32] *CLMA*, s 54(5)(b).

[33] [2008] HCA 20.

private property from expropriation in the Anglo-Australian legal tradition is.[34] While the United States has a constitutional protection for private property in the Fifth Amendment, guaranteeing that property will only be taken for 'public purpose' and with 'just compensation',[35] we have no equivalent. What we have is a number of principled statements from authoritative writers such as Locke and Blackstone,[36] a minor constitutional limit on the Commonwealth that its takings 'for any purpose in respect of which the Parliament has power to make laws' be accompanied by 'just terms',[37] no state equivalent of this provision,[38] and the principle of statutory interpretation, referred to by Santow J, that the legislature is presumed not to intend to interfere with vested property rights. What we lack is a constitutional guarantee, at

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[34] In *Griffiths*, the majority of the High Court, Gummow, Hayne and Heydon JJ at [28]-[30], Gleeson CJ agreeing at [1], held that the *Lands Acquisition Act* (NT) authorised the compulsory acquisition of native title by the Minister for Lands, Planning and Environment for any purpose whatsoever, including the granting of the land in question to other citizens.

[35] The content of this right is by no means uncontested. See *Kelo v City of New London* 545 US 469 (2005); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984); *Berman v Parker* 348 US 26 (1954).

[36] Locke's view in his *Two Treatise of Government* (1690) was that property could not be taken without a man's consent, but Locke defined consent as the owners' or that of his elected representatives. Blackstone, in his *Commentaries on the Laws of England* (1765), vol 1, 139 stated that 'So great moreover is the regard of the law for private property, that it will not authorize the least violation of it', however that legislature could compel individuals to acquiesce in the loss of their property if it provided a 'reasonable price': cited from Michael Taggart, 'Expropriation, Public Purpose and the Constitution' in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, Clarendon, Oxford 1998, 91-112. The upshot of both of these comments appears to be an unlimited power in Parliament to acquire property so long as it pays compensation.

[37] *Commonwealth of Australia Constitution Act* s 51(xxxi) and *Clunies-Ross v Commonwealth* [1984] HCA 65; (1984) 155 CLR 193. See S Brennan 'Native Title and the Acquisition of Property Under the Australian Constitution' [2004] *Melbourne University Law Review* 2.

[38] The New South Wales Parliament has a general power under s 5 *Constitution Act 1902* to 'make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever'. These have been interpreted as words of grant, not limitation: per Kirby J *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7. Although there is a *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), which is routinely utilised to acquired land, the New South Wales Parliament has the power to acquire property without compensation at all: *Pye v Renshaw* (1951) 84 CLR 58, *Minister for Lands (NSW) v Pye* (1953) 87 CLR 469 at 486; *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7 per Gaudron, McHugh, Gummow and Hayne JJ at [7] and per Kirby J at [56].

both levels of government, that land will only be taken for a 'public purpose'.[39] The result is that it is *prima facie* possible, with very clear words and intent, for the New South Wales Parliament to legislate to authorise owners corporations or community associations to expropriate the common property rights of others, without compensation and without consent.

However, it is arguable that the New South Wales Parliament, never intended any such thing. The expropriation of property for the sole purpose of transferring it from one private citizen to another is fundamentally at odds with the values of liberal democracies. Gray goes so far as to state that it is 'one of the more ancient and majestic themes of global jurisprudence that private necessity can never demand that the lands of one individual be taken peremptorily and given to another individual exclusively for his or her personal benefit or profit'.[40] The fact that cases like *Young* and *Houghton v Immer (No.155) Pty Ltd,*[41]discussed below, are rare, perhaps stands as testimony to the fact that taking your neighbours' property would be an anathema to most people and thus most strata and community title residents never realise that the legislation potentially enables them to do so. Finally, if the New South Wales government had expressly intended to grant this power, public outcry would no doubt have ensued. Perhaps the single most significant protection from private-to-private transfers, or any takings without sufficient public justification, is popular dissent, or what Kirby J in *Griffiths* termed 'political accountability and democratic answerability'.[42] As noted by Brennan, when the New South Wales government mooted changes to planning laws that would allow private-to-private transfers, media attention and public criticism was such that the proposal did not proceed.[43]

III Fraud on the minority

The alternative argument that the plaintiffs presented in *Young* was that the exclusive use by-law amounted to a fraud on the minority or misuse of power. Santow J held at

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[39] The essential difference between the decisions in *Clunies-Ross* and *Griffiths* was that the *Lands Acquisition Act 1955* (Cth), considered in the former case, granted a power to 'acquire land for a public purpose', while the *Lands Acquisition Act* (NT), considered in the latter case, had had the words 'public purpose' removed in 1982. The result was that in *Griffiths*, for the majority, the Act authorised takings for the purpose of granting the land to others.

[40] Gray K 'There's no place like home', (2007) 11(1) *Journal of South Pacific Law* 73-88, 74. This statement was cited by Kirby J at [129] in his dissent in *Griffiths*.

[41] [1997] NSWSC 608.

[42] *Griffiths*, per Kirby J at [113].

[43] Brennan S, 'Compulsory Acquisition of Native Title Land for Private Use by Third Parties' (2008) 19 *PLR* 179, 183.

[45] that had the resolution purporting to make the by-law been valid under the *SSMA*, it would none the less have been struck down as fraud on the minority, as the plaintiffs would lose a valuable right. Santow J held that there was no substantive difference between a compulsory extinction of rights and the compulsory transfer of them from one to another.[44]

The leading strata case in this area is *Houghton v Immer(No.155) Pty Ltd.*[45] The case involved a five lot scheme in inner Sydney. The respondent owned lot 1, which was an auto repair shop, while the appellants had been the owners of lots 2-5. With the appellants' controlling votes, the body corporate[46] resolved to subdivide lots 2-4 into new strata lots 6-17 and subdivided lot 5 and the common property on the flat roof area, into penthouse lots 18 and 19. The body corporate's interest in these lots, as a result of its ownership of the former common property, was then transferred to the appellants for $1.

The legislative scheme in the *Strata Titles Act 1973* (NSW) manifestly failed to protect the plaintiff in this case. Section 25 stipulated that a body corporate may 'pursuant to a *unanimous resolution*, execute a transfer or lease of common property', [my emphasis] however, s 9 provided that lots and/or common property, could be sub-divided by the registration of a plan of subdivision that complied with sub-section (3). Section 11 provided that such a plan should not be registered unless it was accompanied by a certificate under the seal of the body corporate certifying that it had agreed, by *special resolution* to the new unit entitlement. The Court (Handley JA, Mason P and Beazley JA agreeing), held that on registration of the plan of subdivision, the roof and air space ceased to be common property. It became a lot, which vested partly in the body corporate, but the Act did not require the body corporate to deal with lots derived in whole or in part from common property as if they were still common property. The Court held that, 'The provisions which authorise a body corporate to approve such a sub-division by special resolution are clear and leave no room for the presumption against interference with private property'.

However, the Court went on to hold that compliance with the formal requirements for the valid exercise of a power did not exclude the right to equitable relief. While

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44 *Heydon v NRMA* [2000] NSWCA per Ormiston AJA at 577; *Gambotto v W C P Ltd [1995] HCA 12;* (1995) 182 CLR 432.

45 [1997] NSWSC 608.

46 The *Strata Titles Act 1973* (NSW) used the term 'body corporate', which remained in the new *SSFDA*, which came into force in 1997. Confusingly, the *SSMA* uses the term 'owners corporation' instead of body corporate.

the lot owners did not have to exercise their voting power as fiduciaries, but rather could vote in their own interests, the doctrine of fraud on a power applied to bodies corporate. The Court cited Lord Lindley in *British Equitable Assurance Company Limited v Baily*,[47] who said that 'the powers of altering by-laws, like other powers, must be exercised bona fide, and having regard to the purposes for which they are created, and to the rights of persons affected by them.'[48] The special resolution authorising the appropriation of what had been common property for the exclusive benefit of the defendants amounted to a fraud on the minority. The Court awarded the plaintiff equitable compensation in accordance with the principles that apply to improvements made by one co-owner.[49]

While the principle of fraud on the minority is an important protective principle, is it sufficient to protect interests in land? Further, is it acceptable that registered proprietors of non-strata titles are guaranteed significant protection through the principle of indefeasibility, while owners of strata title, although also Torrens, may lose valuable interests on the vote of their neighbours, with only a discretionary equitable principle to save them?

IV By-laws creating proprietary interests in lots

Exclusive-use by-laws relate to the use and enjoyment of common property and the rights of lot owners as tenants in common as a result. But what of by-laws that apply to individual lots?

White v Betalli[50]raised the question of whether it is possible to create by-laws that grant lot owners rights to use other owners' lots. The land was an existing building on Port Hacking, in Sydney's south, which had been strata subdivided into a two lot scheme. Lot 1 was on the street side of the land and lot 2 on the water side. There was a registered easement in favour of lot 1 allowing it access to the water, as well as a boat storage area *within* lot 2. Standard residential by-laws had been registered with the scheme,[51] supplemented by special by-law 20, which stated that,

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47 [1906] AC 35 at 42.

48 *British Equitable Assurance Company Limited v Baily* [1906] AC 35 per Lord Lindley at 42.

49 *Brickwood v Young & Ors* [1905] HCA 12; (1905) 2 CLR 387; *Forgeard v Shanahan* (1994) 35 NSWLR 206.

50 [2007] NSWCA 243.

51 Strata Schemes Management Regulation 2005, Schedule 1.

> The Registered Proprietors for the time being of Lot 1 shall have the right to store small watercraft within the area denoted (A) on the sketch annexed to this instrument.

The instrument was the registered strata plan. The by-law was expressed to be made pursuant to s 52 *SSMA*, although it was conceded by both parties that as it did not relate to common property, this could not be correct. Significantly, the by-law had been registered by the developer and thus was in place at the time both the appellant and the respondent purchased their respective lots.

The appellant, the owner of lot 2, argued that the by-law was invalid on a number of grounds. First, she said that the rights created by the by-law were in the nature of an easement and that as the legislature had provided a specific means by which easements could be created in s 88B *Conveyancing Act 1919*,[52] the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia,*[53] precluded the operation of general provisions such as s 43 *SSMA* to achieve the same effect.

This argument was rejected by Santow JA at [32], Campbell JA agreeing at [207], on the grounds that there was no question of powers within 'the same instrument'. Santow JA said that the *SSMA* created 'an alternative mode [to the *Conveyancing Act*] for creating what is in the nature of an easement'. McColl JA, in dissent, said that the *Anthony Hordern* principle did not apply because the by-law, by effectively giving exclusive possession of area (A) to the owner of lot 1, could not be an easement.[54]

The applicant then argued that the by-law was *ultra vires*, as *SSMA* did not authorise the making of a by-law that gave rights to one lot owner to use another's lot. Santow JA, agreeing with the trial judge, held that the power to make by-laws was extremely wide and subject only to the express limitations in s 49 *SSMA*.[55] However, the trial

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52 *Conveyancing Act 1919* (NSW), s 88B allows for the creation of easements by indicating them on a plan of subdivision, including a strata plan of subdivision lodged pursuant to s 7(3) SSFDA.

53 [1932] HCA 9; (1932) 47 CLR 1; The principle in *Anthony Hordern*, as stated by Gavan Duffy CJ and Dixon J at 7 is that, 'When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.'

54 Re Ellenborough Park [1956] Ch 131; *Copeland v Greenhalf* [1952] Ch 488; *Harada v Registrar of Titles* [1981] VR 743; Clos *Farming Estates Pty Ltd (Recs and Mgrs Apptd)(ACN 003 435 256) v Easton and Another* [2002] NSWCA 389; (2002) 11 BPR 20,605 cited by McColl JA at [171]-[193].

55 Above note 9.

judge had acknowledged that as by-laws could 'substantially interfere with the right of an owners of a lot to use the lot', a remedy against potential injustice could be sought in the owners corporation ability to only make by-laws for 'a proper purpose' and in the power of an adjudicator to make an order amending or revoking a by-law or declaring a by-law invalid. While the former concept will be explored further in the discussion of *Owners of Strata Plan No 3397 v Tate*[56] below, the latter can be dismissed almost immediately. Section 157 *SSMA* simply refers to an adjudicator's power to amend or repeal by-laws if 'having regard to the interest of all owners of lots in a strata scheme in the use and enjoyment of their lots or the common property' the by-law 'should not have been made'. Section 159 allows an adjudicator to invalidate a by-law 'an owners' corporation did not have the power to make'. Neither provision provides any guidance on what is or isn't a proper by-law or what is or isn't in the interests of all owners.

In a considered judgement, McColl JA, in dissent, touched on the heart of the matter: that is, it cannot be the case that the legislation authorises people to pass by-laws that would allow them proprietary rights over their neighbours' homes without consent. While the appellant in question bought her lot subject to the existing by-law, if such a developer made by-law was valid at the inception of the development, a subsequent by-law of the same substance would also be valid, the legislation making no meaningful distinction between the two. McColl JA referred to the history of the strata legislation, in particular the inclusion of the s 49 *SSMA* restraint on the power to make by-laws preventing dealings with lots.[57] She said at [151] that this was 'intended to secure, rather than detract from, a strata proprietor's right to unfettered title to a lot equivalent to that of a homeowner. A by-law which impinges on one proprietor's title to a lot by giving another proprietor the equivalent of property rights over part of it is inconsistent with that core construct of the strata titles legislation.' While conceding that the wording of s 47 *SSMA* authorising the making of by-laws for the 'control, management, administration, use or enjoyment of the lots or the lots and common property' was extremely general, she held that general words could not be given such a wide meaning that would lead to results contrary to the manifest policy of the Act. The purpose of the *SSMA* was 'to permit owners corporations to manage strata schemes as a whole, not to confer rights on one proprietor at the expense of another'.[58] She pointed out that it would be strange for the legislature to lay down detailed provisions in s 52 stipulating the way in which

[56] [2007] NSWCA 207.

[57] Above note 9.

[58] McColl JA at [145].

lot owners could be given exclusive use of common property but not provide any similar safeguards when rights were to be given over individual lots.[59] Like Santow J, (as he then was) in *Young*, McColl JA made reference to the principle in *Clissold v Perry;*[60]at 373 that a statutory power will not be interpreted as permitting interference with vested property rights unless that intention is made clear,[61] but like Santow J, she did not refer to the troubling fact that this is not expropriation by the state for a public purpose, but expropriation by private citizens, authorised by the legislature, for purely private gain.

The final argument that the appellant made was that the by-law was inconsistent with s 42 *Real Property Act 1900* (NSW) and the principle of indefeasibility. Santow JA agreed with the trial judge that this argument could not be dismissed on the grounds that the by-law merely had contractual effect, because the by-law 'clearly represent[ed] a proprietary interest'.[62]

The trial judge's reasoning on this point was interesting. He noted that pursuant to s 42, the appellant's title was 'subject to such other estates and interests' as were recorded in her folio. The Second Schedule of her folio made reference to 'Interest recorded on registered folio CP/SP67662', which was the folio for the common property. The Second Schedule of this folio included the notification 'Attention is directed to the strata scheme by-laws file with the strata plan'. The trial judge reasoned that in this way the interest of the registered proprietors of lot 1 over lot 2 created by the by-law was recorded on the folio of lot 2.[63]

The trial judge went on to note that even if this were not the case, it was arguable that the by-laws constituted an *in personam* exception to indefeasibility. Under s 44 *SSMA*, by-laws bind the owners' corporation and owners as if they contained mutual covenants, signed, sealed and delivered, to observe and perform all the provisions of the by-laws, (often referred to as 'the statutory covenant'). The trial judge argued that this statutory contract could be an exception to indefeasibility in the same way as personal rights arising from a contract between a registered proprietor and a third party. In other words, on becoming a lot owner, the appellant immediately subjected her title to contractual rights in favour of the collective.

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59 McColl JA at [149].

60 (1904) 1 CLR 363 at 373.

61 McColl JA at [152].

62 Santow JA at [53].

63 Cited by Santow JA at [65]-[67].

The respondent developed the first argument on appeal and Santow JA held that as the Register was made up of folios and registered dealings,[64] 'dealings' were defined as registrable instruments,[65] the instrument by which by-law 20 was made was registered,[66] then the interest created by the by-law was recorded on the folio for lot 2.[67] This made it unnecessary to consider the question of whether the statutory contract was an *in personam* exception to indefeasibility.

These arguments hold water for the facts in question which involved a pre-existing by-law which was revealed to the appellant via the Register before she purchased. However, they would not apply to a circumstance where a by-law like this was made *after* a person such as the appellant acquired their lot. Then the question would be, is a by-law creating a proprietary interest in a lot, without the owner's consent,[68] inconsistent with the owner's indefeasible title conferred by s 42 *Real Property Act 1900* (NSW) and thus invalid under s 43(4) *SSMA*?[69] The answer must surely be yes. Disturbingly, there is no equivalent of s 43(4) *SSMA* in the CLDA or CLMA[70] and thus the same argument could not be made for community title by-laws. Like the restricted property provisions discussed above, this is a cause for concern.

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64 *Real Property Act 1900* (NSW), ss 31B(2)(a) and (b).

65 *Real Property Act 1900* (NSW), s 3.

66 Cf s 115K(4) *Land Title Act 1994* (Qld).

67 Santow JA at [71] made reference to *Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd* [1971] HCA 9; (1971) 124 CLR 73 at 77-8 in noting that an interest is sufficiently recorded in the folio if the folio states the registration number of the dealing creating it and identifies the interest in generic terms.

68 This would probably only have been possible if the scheme was larger and the appellant was in the minority.

69 SSMA, s 43(4) states that a strata by-law has no force or effect to the extent that it is inconsistent with the SSMA or any other Act or law. While an argument based on overriding statutes might spring to mind here, it is not applicable. Even without s 43(4) SSMA, by-laws are not the SSMA itself but rather delegated legislation under it. The *Real Property Act 1900* (NSW) could not be overridden by delegated legislation written by private citizens.

70 CLDA, Schedule 3(1)(b), a management statement must not be inconsistent with an Act or law that, by the operation of section 116 of the CLMA, applies to any part of the community property that is an open access way and s 14(2)(b) CLMA, a management statement must not be amended to be inconsistent with the CLDA or CLMA. CLDA, s 3(2) and CLMA, s 3(2) state that if there is an inconsistency between those Acts and the *Real Property Act 1900* (NSW), the former prevail.

Before moving to the next section, it is worth noting the significance of the disagreement between Santow JA and Campell JA on one hand and McColl JA on the other, as to whether the interest created was an easement. The former held that the right was 'in the nature of an easement' while the latter held that it offended the fourth element in *Re Ellenborough Park*[71] by granting rights of exclusive possession. The disagreement on the facts is not necessarily significant, but Santow JA's comments at [39] are. He said that 'even were the traditional constraints applicable to easements to be imported to the strata titles legislation, I would not consider this requirement [not to grant exclusive possession] to be contravened'. Santow JA was alluding to the inevitable conclusion that the strata titles legislation allows for the creation of an infinite variety of rights through by-laws and that to the extent these rights create proprietary interests, they do not need to fall within existing categories of property rights.[72] In one fell swoop, the strata titles legislation eradicates the *numerus clausus* principle, the 'metaprinciple' of land law that strictly limits the kinds of interests that can be recognised as proprietary and binding on subsequent purchasers.[73]

Does this matter? Possibly. In an analysis of the *numerus clausus* principle in contemporary Australian law, Edgeworth argues that while the principle is outdated in some respects, it is not obsolete. Edgeworth identifies two primary rationales[74] for the principle: the first is that it frees land of multiple obligations and restrictions that limit the uses to which the land can be put. He says that, 'If parties were free to restrict the usages of land by agreements capable of binding successors in title indefinitely, land could be shackled in ways that might revive all the impediments to economic reform that were endemic in feudal real property law.'[75] The second reason is that a 'proliferation of the number and range of rights will tend to make the conveyancing process more complex, time-consuming and hazardous.'[76]

Edgeworth argues that the persuasiveness of this second rationale is radically reduced by modern registration systems, specifically Torrens systems which can 'readily accommodate a much wider range of interests in land, imposing minimal

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71 [1956] Ch 131.

72 Cf *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389.

73 'Metaprinciple' is the term used by Edgeworth in 'The Numerus Clausus principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387 at 390.

74 Edgeworth, above note 73 , identifies a third, at 395, that the principle protects the integrity of what Lord Brougham LC in *Keppell v Bailey* (1834) 2 My & K 517, 39 ER 1042 referred to as the 'science of the law', but this is less important that the other two rationales.

75 Edgeworth, above note 73 at 394.

76 Edgeworth, above note 73 at 394.

additional transaction costs on successors in title.'[77] This comment is true for strata title but perhaps slightly less so than other forms of title. As *White v Betalli* demonstrates, by-laws are registered dealings and thus available for all prospective purchasers to see. By-laws have no force or effect until they are registered.[78] However, registration does not give effect to by-laws that have 'not been lawfully made'[79] and thus, registration of a by-law does not produce the same certainty that registration of other interests does.

On a practical level, even if by-laws are on the register, it does not mean purchasers (or their lawyers) have read them. By-laws for strata and community title developments can be voluminous. Community title contracts, which include the by-laws, frequently take up an entire lever-arched folder. In off-the-plan sales, by-laws can be a moveable feast. Purchasers commit by contract well before registration of the strata or community plan so that all they may have seen is a copy of draft by-laws which then change on registration of the scheme.[80] It has been common practice in some large developments to require purchasers to pay a refundable deposit before they are even given a contract with a copy of the draft by-laws in it. At least in relation to initial sales, it is hard to take comfort from the fact that the great variety of restrictions and interests that may be created by by-laws will be readily ascertainable by purchasers.[81]

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77 Edgeworth, above note 73 at 406.

78 Section 48(1) *SSMA.*

79 Section 8(4D) SSFDA states that 'The proposed by-laws for a strata scheme have no effect until the strata plan (and any proposed by-laws that are required to accompany it) are registered. However, registration does not operate to give effect to by-laws that have not been lawfully made.' This seems to only apply to the registration of initial by-laws and there does not seem to be a corresponding provision in the SSMA that applies to the registration of improperly amended by-laws.

80 *Parkin v Pagliuca* [2008] NSWSC 168 is a good example of an off-the-plan sale where the purchaser committed to a contract having only seen an artist's impression of the building and some sample tile finishes. There was no indication she had seen any by-laws or even a strata plan defining the boundaries of her lot. Bryson AJ commented at [3] that 'a developer who sold 'off-the-plan' in this way was sleepwalking his way into the Equity Court'. The same could be said of the purchaser, if she were lucky.

81 Edgeworth, above note 73 at 402, footnote 54, makes reference, to the liberal critique of Epstein 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *Southern California Law Review* 1353 and 'Past and Future: The Temporal Dimension in the Law of Property', (1986) 64 *Washington University Law Quarterly* 1353. Epstein argues that people should be free to contractually create whatever property rights they wish and that the market will eradicate those that are not ultimately beneficial. Epstein's articles are part of a larger debate on home owner associations, the United States equivalent of our community

The first rationale for the *numerus clausus* principle, identified by Edgeworth, is a much more serious concern for strata and community title. The potential for titles to be cluttered by a myriad of restrictions that might have been beneficial to the parties who created them, but now serve no useful purpose is enormous.[82]

Edgeworth's conclusion on the *numerus clausus* principle is instructive here. He argues that the stringency of the principle should be relaxed but that changes should be incremental. He says that it would make sense to impose a requirement of some kind of public benefit test before new interests are recognised and that the interests of future owners need to be considered, so that their freedom to do what they want with their property is not 'heavily circumscribed by the shackling of land with "fanciful" obligations.'[83] Edgeworth concludes that these changes should not be

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title. In the US, positive covenants have been able to run with the land since the early twentieth century (Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, 1994, Yale University Press at 29-55) leading to the proliferation of home owner association or common interest communities that are affected by a set of 'CC and Rs', covenants, conditions and restrictions. These are the orthodox property law equivalent of strata and community title by-laws. In the early 1980s a large debate occurred between legal scholars about the social and economic desirability of these developments, partly focusing on the question of whether purchasers ever really consent to the restrictions attached to their land. R Ellickson, 'Cities and Homeowner Associations' (1982) 130 *University of Pennsylvania Law Review* 1519; G Frug 'Cities and Homeowner Associations: A Reply' (1982) 130 *University of Pennsylvania Law Review* 1589; R Ellickson, 'A Reply to Michelman and Frug' (1982) 130 *University of Pennsylvania Law Review* 1602; G Alexander 'Dilemmans of Group Autonomy: Residential Associations and Group Autonomy' (1989-1990) 75 *Cornell Law Review* 1; R G Natelson *Consent, Coercion, and Reasonableness in Private Law: The Special Case of the Property Owners Association*, (1990) 51 Ohio St LJ 41

82 For example, the management statement for the Permaculture Hamlet Nimbin, DP285174, includes in article 37 a requirement that 'at least one of the proprietors of each neighbourhood lot shall prior to the commencement of landscaping or erection of any dwelling house upon such Lot attend a Permaculture Instruction Course designated or approved by the Executive Committee.…' The requirement that window coverings only be white is found in hundreds of strata and community title by-laws. By-laws like these are highly prescriptive and may become obsolete. One day white blinds will be as aesthetically desirable and price-augmenting as mission brown paint. Of course, by-laws can be changed with the appropriate vote, but this may not be easy. For example, a unanimous resolution is needed to change by-laws that fix the 'theme' of a community title development: *CLMA*, s 17.

83 Edgeworth, above note 73 at 406.

made by the judiciary, but by the legislature, citing the example of the forestry rights and carbon sequestration credits in the New South Wales *Conveyancing Act 1919*.[84]

Unfortunately, none of these safeguards can be seen in the strata and community title legislation. There are almost no limits on the content or quantity of by-laws. There is no requirement that their validity be tested against a benchmark of public benefit and while they are in theory creatures of statute, in reality, they are the legislature presenting private citizens, whether developers or owners, with a *carte blanche* to create and burden property with whatever rights and restrictions that currently take their fancy.

V Interpretation of by laws – delegated legislation, statutory contract, commercial contract or property rights?

Moving away from by-laws that potentially expropriate property without consent, this final section will consider how we interpret by-laws. This is a fundamental part of determining the ambit of obligations that burden titles. Although by-laws have proliferated across the country in the past forty years, courts are still unclear on what kind of interests they create – contractual, proprietary or novel.[85] They are also undecided on how by-laws should be construed. As a term of a commercial contract, as a statutory contract, as delegated legislation or sometimes as registered proprietary interests?

The leading New South Wales case is *Owners of Strata Plan No 3397 v Tate*.[86] The by-law in question was an exclusive-use by-law under s 52 *SSMA*, giving the owner of a lot 1 exclusive use of Lift 4 in a mixed use building. Lot 1 comprised parking spaces in the basement and levels 6-15 of the tower, all of which made up a motel. The owner of lot 1 had had de facto exclusive use of the lift for many years, but it was formalised in 1989. The by-law provided that the owner of lot 1 was to pay all sums related to maintenance and repair of Lift 4 and one quarter of the costs of running the

[84] Subsections 87A, 88AA, 88AB.

[85] In *Chauhan v Jaynrees Services Pty Ltd* [2008] NSWSC 969 Young CJ considered the nature of rights that an exclusive-use by-law created. Young CJ held at [42] that 'the rights under the present Act appear to be statutory, and I believe – I would not like to held to this in subsequent proceedings – that the rights are probably proprietary sui generis'. Santow JA in *White* said at [53] that 'I agree with the trial judge's conclusion that the appellant's contention that the by-law is inconsistent with s 42 of the *Real Property Act* cannot be dismissed on the ground that the by-law merely has contractual effect; it clearly represents a proprietary interest.'

[86] [2007] NSWCA 207.

lift system. The respondent formed the view that he was overpaying because when all owners were levied for the administrative and sinking funds he paid 19.382 per cent, in accordance with his unit entitlement. He then paid an additional 25 per cent of the costs of running the lift system in accordance with the exclusive-use by-law levies, amounting to a total of 44.382 per cent of the lift costs.

The trial judge had held that as a matter of common sense the parties who made the exclusive-use by-law must have intended that 75 per cent of the costs of the lift system would be paid by the remaining lot owners and that such an interpretation gave the by-law a 'commercial businesslike interpretation'.[87]

On appeal Harrison J, (Mason P agreeing), found that on the contrary, the circumstances of the case persuasively suggested that at the time the by-law was formulated, the proprietor of lot 1 was intent on converting the informal exclusive use of lift 4 into a legally enforceable right to do the same thing.[88] This right was valuable and payment over and above the proportionate cost of maintaining lift 4 appeared a matter of 'common sense' and to conform to 'a commercial, businesslike' approach.[89]

In another considered judgement, McColl JA addressed the more general question of how by-laws should be interpreted. She held at [33] that the trial judge was in error in applying principles of contractual interpretation, unconstrained by the statutory framework.

McColl JA identified two possible characterisations of by-laws. The first was that they are delegated legislation, being instruments 'made under an Act'[90] and thus should be interpreted according to principles of statutory interpretation.[91] This approach had been confirmed by the High Court in *Dainford Ltd v Smith*[92] Delegated legislation must not contradict, be repugnant to or inconsistent with the Act under which it is made.[93] This principle is instructive in determining the meaning of by-laws, as well as their ultimate validity. Importantly, by-laws are different to contractual obligations in that they are binding on all persons to whom they apply,

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87 *Tate* , above n 24 at [95].

88 Harrison J at [116].

89 Harrison J at [116].

90 Section 3 *Interpretation Act 1987* (NSW) cited by McColl JA at [35].

91 *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1986) CLR 389 at 398.

92 [1985] HCA 23; (1985) 155 CLR 342; cited by McColl JA at [40].

93 *Re Taylor* [1995] 2 Qd R 564. This principle is actually included in s 43(4) *SSMA* on the making of by-laws. It states that 'A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law'.

regardless of whether they agree or not. McColl JA at [46] made reference to the fact that an exclusive-use by law, such as the one in question, would bind all owners of the common property whether or not they had voted in favour of it, so long as the by-law had been agreed to by 75 per cent of those entitled to vote.[94]

The second characterisation of by-laws was as 'a statutory contract, deemed to exist by statute and constituted by the 'bundle of rights and liabilities' created by the 1973 Act, the model by-laws and any special by-laws'.[95] McColl JA pointed out at [48] that the deemed covenant provisions[96] were modelled on the deemed covenant provisions of corporations law, which ensured that a company and its members were bound by the memorandum and articles of association. The significant characteristic of a company's constitution is that it has a public, not just private purpose. It informs third parties who deal with the company of its 'permitted range of enterprise'[97] and as third parties cannot be privy to the circumstances in which the constitution was negotiated, a tight rein must be kept on the surrounding circumstances permissible to consider when construing a company constitution.[98]

McColl ultimately decided that the by-law only dealt with the proprietor of lot 1's liability to contribute to the cost of lift 4 and did not have any effect on that proprietor's statutory obligation to contribute to the maintenance of common property generally, including lifts 1-3. Further, while the by-law had a commercial effect for the proprietor of lot 1, it was not a commercial transaction, but rather,

> an adjustment of statutory obligations which conferred a proprietorial estate upon the proprietor of Lot 1 in respect of Lot 4 [*sic* Lift 4] and, conversely, deprived the remaining proprietors in the strata scheme of the proprietary

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94 This *obiter* comment again raises the question of the proper interpretation of s 52 *SSMA* and the identity of the owners concerned who must consent to exclusive-use by-laws. Above note 24.

95 McColl JA at [47].

96 Section 58(5) *Strata Titles Act 1973* (NSW) was the section in question. It is now in s 44(1) SSMA which states that 'The by-laws for a strata scheme bind the owners corporation and the owners and any mortgagee or covenant chargee in possession (whether in person or not), or lessee or occupier, of a lot to the same extent as if the by-laws...had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, lessee and occupier, and...contained mutual covenants to observe and perform all the provisions of the by-laws.'

97 *Egyptian Salt and Soda Co Ltd v Port Said Salt Association Ltd* [1931] AC 677 per Lord Macmillan at 682, cited by McColl JA at [61].

98 *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* [2005] FCA 1812; (2005) 56 ACSR 263 per Finn J at [79], cited by McColl JA at [65].

> interest they had hitherto had in that part of the common property. The proprietorial nature of the by-law was indicated by its registration. The public nature of the by-law called for the interpretive exercise to focus on its language and statutory context rather than inferred intentions drawn from the *de facto* position concerning Lift 4 prior to the making of Special By-Law 21.[99]

This statement brings us back to a central dilemma in relation to by-laws: if a by-law creates or expropriates proprietary interests, does it not need to be considered within the framework of general property principles? In this context, it is arguable that by-laws *of a proprietary nature*, (although not other by-laws), should be interpreted in the same way as interests on the Torrens register. Might the answer to the interpretation question in *Tate* have been found, not in principles of delegated legislation or statutory contracts, but in *Westfield Management Limited v Perpetual Trustee Company Limited*[100]? Here the question was whether extrinsic material could be used to interpret a registered easement. The Court at [37]-[39] said that

> rules of evidence assisting the construction of contracts *inter partes*, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, did not apply to the construction of the Easement.... The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.[101]

This statement rings equally true for strata by-laws. A prospective purchaser cannot possibly be expected to know the circumstances that lead to a by-law's creation and expecting him or her to do so, would fly in the face of Torrens principles.

VI Conclusion

This article has highlighted a number of unresolved problems with strata and community title legislation, in particular the ways in which the legislation can be used to undermine title to land. The core issue is the insufficient recognition within the statutes that there are qualitative differences between by-laws, with some actually creating proprietary interests in either lots or common property, which then correspondingly divest others of an interest in land. To the extent that this end can be

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99 McColl at [76].

100 (2007) 239 ALR 75.

101 In the footnote to this statement the Court wrote cf *Proprietors Strata Plan No 9,968 v Proprietors Strata Plan No 11,173* [1979] 2 NSWLR 605 at 610-612. Although this case was between two strata plans, no question in relation to the strata legislation was in issue.

achieved without the consent of those who are divested, the legislation, in particular the community title Acts, are a cause for concern.