14th Australasian Property Law Teachers' Conference 2017
Beyond Sole Ownership
Curtin Law School, Curtin University, Perth, Western Australia
26 – 29 September 2017

Thursday 27 September 2017

Plenary Session 1

The Dynamics of Enduring Property Relationships

This presentation proposes a new way of looking at property relationships that will enrich our understanding of how property relationships operate in the real world.

It focuses on property rights in land which are consensual in origin, although this approach could be usefully applied both to non-consensual property relationships and to other types of property. Whereas current property law scholarship has largely ignored the temporal dimensions of property (and the spatial dimensions of land), the dynamics approach reflects the fact that property relationships are lived relationships affected by changing patterns and understandings of spatial use, relationship needs, economic realities, opportunities, technical innovations, and so on.

It also recognizes the broad range of legal, regulatory, social and commercial norms that shape property relations, and that although property relationships evolve responsively to accommodate changing uses of land and new rights-holders, the relationships themselves are sustained and enduring.



Professor Sarah Blandy

Sarah Blandy is a Professor of Law in the Faculty of Law at the University of Sheffield. Sarah's research concerns 'property law in the real world', a perspective she tries to integrate into her teaching. She is also an executive committee member of the Socio-Legal Studies Association.

Sarah's research is interdisciplinary and empirical, focusing on socio-legal aspects of property law, including tenure and rights; collective and individual property rights; multi-owned property; regulation of conduct, dispute resolution, and access to justice, amongst residential occupiers and the spatial boundaries of law, especially in relation to fortified homes and gated communities.



Professor Susan Bright

Susan Bright is a Professor of Land Law at New College, University of Oxford.
Her research in contract law and in property law is a mix of doctrinal work, socio-legal work and empirical work. She is currently engaged in interdisciplinary projects that explore how the ownership and management ('governance') arrangements of multi-owned properties can limit the installation of energy efficiency measures and renewable technologies. She also sits as a fee-paid judge in the First Tier Tribunal (Property Chamber) that hears disputes involving residential leasehold properties.



Professor Sarah Nield

Sarah Nield is a Professor of Property Law at the School of Law, University of Southampton.
Her main research interests are in Land Law and she has co-authored the leading Land Law Text Cases and Materials: textbook published by Oxford University Press now in its 3th edition. Her current research concentrates upon the regulation of residential mortgages, human rights and property and the governance of commons property. She has written extensively in these areas.
Together with Sarah Blandy and Sue Bright she is a key researcher in the Dynamics of Enduring Property Relations project.

Wednesday 27 September 2017

11.30 – 1.00 pm - Parallel Session 1

Room 2.08

Emerging Theories of Property Law

Chair: Leon Terrill

Progressive Property, Place and Post Humanism

Nicole Graham

American property theorists, calling themselves 'progressive property theorists' offer a significant departure from orthodox and abstract notions of property. A key component of their focus is 'community'. Their position is that property enables and shapes community life. Property can render relationships within communities either exploitative and humiliating; or liberating and ennobling. Property law, they say, should establish the framework for a kind of social life appropriate to a free and democratic society. Progressive property theorists reject a modern liberal and atomized perspective of community as being a collection of autonomous individuals. Instead, the progressive property conception of community involves what Jennifer Nedelsky calls 'relationality' and what they refer to as a bond of kinds either through 'high exist costs or coercive communal norms'. The problem with this otherwise exciting development in contemporary property theory is that by 'community' progressive property theorists mean principally people. This limits the radical potential of progressive property theory because it perpetuates the humanist paradigm that underpins a great deal of what progressive property theorists are working against. The anthropocentrism of the current progressive property use of the idea of 'community' is not however essential to the theory itself. I am interested in broadening the idea of community at work in progressive property theory to include the 'more-than-human' members of specific and placed communities. The idea of community involving necessarily a bonded version of relationality is especially important to a broader, posthuman idea of community. Ecologically speaking, humans are not self-sufficient individual units as between each other, and no species (including humans) are self-sufficient but are necessarily related through living within habitats. Retrieving the notion of habitat from physical science disciplinary discourse, and linking it to the notion of place (defined in terms of specificity and diversity) in humanities discourses is helpful to this end and would enrich the radical potential of the emergent but successful progressive property theory in Anglo-American legal scholarship.



Nicole Graham (University of Technology, Sydney)

Nicole researches the relationship between property and the environment in law, culture and land use practices. She is particularly interested in the role of property rights in natural resource management and environmental planning policies. Nicole's current projects include the role of law in environmental histories and landscape change; and the relationship between law and science in regard to the development of land use policy (including especially vegetation and mining).

Nicole is a member of the Institute of Australian Geographers (IAG), National Environmental Law Association (NELA), Australian Earth Law Alliance (AELA) and the International Union for the Conservation of Nature (IUCN). She supervises three PhD projects and has taught Real Property; Property in Natural Resources; Resources and Environmental Management; Jurisprudence and several first year law subjects in the LLB, BEnvMgt and JD programs at Macquarie University and UTS for which she was awarded University, Faculty, and Law Student Society Teaching Awards.

The connections of public property

John Page School of Law and Justice, Southern Cross University

Public real property is impressive in its physicalised footprint and acreage. It likewise plays a significant (yet often ignored) role in our daily lives. When seen through the prism of *public space*, it is extensively theorised in disciplines as diverse as urban design or geography. However, the public estate is under-regarded and under-theorised in the common law tradition of property. This paper seeks to restore some balance to this discourse, one that emphasises the *property* in the public real property equation.

Specifically, the paper identifies a number of key organising principles around which a theoretical framework of public real property may be tentatively constructed. These include the roles of taxonomy, the many meanings of ownership, the respective importance of sociability, propriety, and belonging, and the pervasiveness of connection. Canvassing a select number of public real property interests, the paper suggests that a reliance on essentially private assumptions, rules and tenets is unhelpful in trying to rationalise the public estate. Public real property is an institution best understood from its unique vantage points, which are amongst many others, beyond the view of sole ownership



John Page

John Page is an Associate Professor in the School of Law and Justice. John was previously a Lecturer at the University of New England - from 2004 to 2010, and an Assistant Professor at Bond University - from 2011 to 2013. Prior to 2004, John was a practicing lawyer for 18 years. John's research interests focus on property plurality, and comparative, historic and inter-disciplinary perspectives on property. He has published internationally and within Australia on topics ranging from the nature of property rights in public resources, the intersection of property and the environment, public property theory, modern common property, and property's relationship to landscape and community.
His current research examines the implications of property diversity; public property theory; property and ecosystem services; property and calamity. John is the author of inter alia Property Diversity and Its Implications (Routledge 2016)and Australian Land Law in context (Oxford University Press 2012) with K Mackie & E Histed.

Property Theories and Negative v Positive Land Registers

Benjamin Verheye

Firstly, this paper analyses several (modern) theories on property law, including overviews of older theories of property (Locke, Bentham, Hegel) on which these are based. These theories tend to provide justifications for the concept ‘private property’. This paper gives an analytical and critical overview of these justifications and offers an introduction to their background theory. Thus, the property theories of Munzer (based on utility/efficiency, justice/equality and labor/desert) and Becker (with four justification principles: two related to the labor theory, one derived from utility and the last one based on political liberty) are analysed. Eventually, also Waldron’s theory of property, providing an analysis of theories based on Locke (labor/desert) and Hegel (person-oriented theories), is scrutinized. Subsequently these theories of property are applied on a positive legal issue: negative *v.* positive land registers in Europe.



Benjamin Verheye, Institute for Property Law, KU Leuven (Belgium)

Benjamin Verheye studied Greek and Latin in high school and continued his education at the KU Leuven Law School. He graduated in 2016 as Master of Laws *summa cum laude.* He is currently a member of the KU Leuven Institute for Property Law, where he writes a PhD thesis in property law on the topic of comparative real estate publicity, under the supervision of prof. dr. Vincent Sagaert. Besides property law, Benjamin is also interested in private law in general, comparative law, legal history and Law and Culture.

In his spare time, Benjamin plays the violin and baroque violin, loves travelling and reads a lot

Wednesday 27 September 2017

11.30 – 1.00 pm - Parallel Session 2

Moot Court

The Conundrum: Sharing v Exclusivity (1)

Chair: Elizabeth Toomey

Reconceptualising Property Law in Apartment Blocks

Frankie McCarthy, Faculty of Law, The University of Glasgow

Improving the energy efficiency of housing is an essential aspect of climate change strategy in many western jurisdictions. For apartment owners, however, property law rules create huge difficulty in undertaking energy improvement works. This paper will outline the nature of these problems in two jurisdictions – Scotland and England – and consider whether the root of the difficulties is the individualistic understanding of ownership which prevails in western countries. Is a community-focused reconceptualisation of apartment ownership the key to law reform in this area?

This paper suggests we should rethink the idea of apartment ownership to focus on its communal nature. The paper will draw on progressive property scholarship which asserts that property rights exist to serve a number of underlying values, principal amongst which is the promotion of 'human flourishing' – simply put, the ability to live a good life. To contribute to human flourishing, any system of property law must not only recognise secure rights for owners, but also recognise their obligations to others in society in respect of goods such as environmental integrity and the aggregate welfare or wealth of society. Models of property ownership employed in relation to apartments must be redrawn to encompass these collective-focused ideas about governance of the commons and the welfare of society. A fundamental reconceptualisation of apartment ownership in this way will create a solid basis for legal reform which resolves the barriers outlined above, and make a valuable contribution towards achievement of our climate change targets.



Frankie McCarthy

Frankie McCarthy was appointed as a Senior Lecturer in Private Law in August 2014, but has been a member of the School as a PhD researcher and then a lecturer since 2007. She is a graduate of the Universities of Edinburgh (LLB, DipLP) and Glasgow (PhD), and has been a visiting researcher at the University of Otago, New Zealand. She is also a qualified solicitor, having worked as a trainee and then solicitor at Simpson and Marwick WS (now part of Clyde & Co) prior to beginning her doctoral studies.

Dr McCarthy is a co-author of Griffiths, Fotheringham and McCarthy's *Family Law* and the editor of the Property section of Green's Scottish Human Rights Service. She acts as an external examiner for the Universities of Edinburgh and Aberdeen. She is a member of the Royal Society of Edinburgh's Scottish Crucible network, and a trustee of South Seeds, Scotland's first SCIO.

Dr McCarthy's research interests lie in property law and family law, and their intersections with human rights. She is particularly interested in:

- The development of property as a human right in Europe. Why do we protect property ownership as a civil right, and to what extent does this right also imply responsibilities? How can property rights theories, particularly the US progressive property scholarship, help us to reconceptualise property ownership?Property as human right in relation to community interests in land in Scotland and the Scottish land reform agenda.
- Ownership rights and responsibilities in relation to community living, especially urban tenement living.
- Family property, particularly the financial rights of non-marital cohabiting couples during and on the breakdown of their relationship.

She has previously researched children's rights, particularly in relation to their intersection with religion. She is also interested in the law of succession.

Case Study of Deep Retrofit in Mixed Tenure Tower Blocks

Susan Bright, New College, Oxford

More than a fifth of the UK's carbon emissions are attributable to residential buildings, and carbon emission targets will require the upgrading of the existing housing stock. This will require a refurbishment at building scale, which presents a particular challenge for blocks of flats as the multiplicity of stakeholders, the dimension of owning 'part within a whole', and the interaction of technology with property law all add to the physical and technical challenges of achieving this goal.

Bright and Weatherall (JEL, forthcoming) suggest that the problem needs to be understood through a building governance framework that takes account both of property law 'as a technology which in itself shapes energy related outcomes in the social and material world' of multi-owned properties, and of the complexity of decision making amongst the multiple parties involved and the interaction with the legal regulation of decision-making. This paper follows the companion paper (McCarthy) that explores the way in which reconceptualising what it does, or might, mean to own 'part within the a whole' may help to overcome some of these governance barriers to improvements. This reconceptualization may, however, be apt only for buildings which are owned by the 'collective'.

In England and Wales, social housing blocks of flats are typically owned by a social housing provider and contain a mix of rental flats and privately owned flats. In this context, the existence of a building owner with 'sole decision-making' power suggests that it should be easier to upgrade the block as there is no need for collective decision making. However, even in these blocks the mix of rental tenants and private owners makes refurbishment difficult.

This paper presents a case study of a current refurbishment project taking place in Oxford: the deep retrofit of five residential tower blocks owned by Oxford City Council, at a total cost of £20 million. The paper discusses the nature of the refurbishment works; the impact of tenure mix on the refurbishment project; OCC's rights to recover costs from individual flat owners; and the effectiveness of consultation and engagement.

The study provides key insights into the difficulties of deep retrofit of blocks of flats. These include the challenge of effective communication and consultation; financing and cost recovery (and legal challenge); the tensions between the costs and benefits of large-scale whole block energy refurbishment versus smaller scale renovations to individual flats; valuing benefits (aesthetic, comfort and financial); access rights; and tensions between different classes of occupiers.



Professor Susan Bright

Susan Bright is a Professor of Land Law at New College, University of Oxford.
Her research in contract law and in property law is a mix of doctrinal work, socio-legal work and empirical work. She is currently engaged in interdisciplinary projects that explore how the ownership and management ('governance') arrangements of multi-owned properties can limit the installation of energy efficiency measures and renewable technologies. She also sits as a fee-paid judge in the First Tier Tribunal (Property Chamber) that hears disputes involving residential leasehold properties.

Strata Title Property Rights: Private Governance of multi-owned properties

Cathy Sherry, Faculty of Law, UNSW

This paper will present the conclusions of Strata Title Property Rights: Private governance of multi-owned properties (Routledge 2017). The book is the first in-depth, extended analysis of Australian strata legislation. Strata Title Property Rights situates strata legislation in the context of traditional property law and modern property theory. It argues that Australian legislatures and courts have failed analyse strata title as property law. Specifically, they have failed to recognise that strata bylaws are positive obligations on freehold land; burdens that orthodox property law has disallowed for centuries. While strata legislation had to modify the prohibition on positive obligations to facilitate the maintenance of buildings with multiple freehold owners (ie the obligation to pay of levies), legislatures have placed almost no limits on the content of negative and positive obligations in by-laws. The consequence is that strata title fees simple are potentially burdened by all manner of positive obligations that go well beyond maintenance of a building. For example, developers routinely create by-laws to support contracts that they cause the body corporate to enter prior to the sale of apartments, eg management and service contracts. The substantial financial obligations that those contracts create will be discharged by subsequent purchasers. Strata legislation places great faith in the concept of 'disclosure', despite the fact that notice has never allowed a freehold owner to be burdened by positive obligations on land. And for good reason. Despite the abstruse nature of covenant (and easement) law, positive obligations are prohibited by property law because they can be economically inefficient, radically reducing the value of land. What seems like a good idea

to an original owner today (whether self-serving or well-intended), can transpire to be a very bad idea in five or 50 years' time. The fact that a purchaser had notice of that idea will not make an economically inefficient burden less inefficient. Property law has long recognised this fact, hence its reluctance to ever facilitate positive burdens or extensive restrictions on freehold land. While there is widespread dissatisfaction and litigation in strata schemes in relation to developer-made contracts,1 neither legislatures nor courts have identified that the source of these problems is a disregard for property law's justified dislike of positive obligations created by predecessors in title. In addition to the economic consequences of strata by-laws, Strata Title Property Rights considers their social and political consequences. While United States courts have long recognised the socially repressive and intrusive potential of privately created land rules (no doubt a result of their history of racially restrictive covenants), Australian legislatures and courts have been largely oblivious to the danger of allowing private citizens to regulate their neighbours' homes. For example, in most states, private citizens can use by-laws to ban their neighbours keeping a budgie or a cat, even if the animal has no impact outside the privately- 1 C Sherry, "Long-term management contracts as developer abuse" in Blandy, S., Dixon, J. and Dupuis, A., Multi-Owned Housing: Law, Power and Practice, Ashgate Publishing, Ashgate, 2010 owned apartment. By-laws can also prevent parents rendering their balconies or windows safe so that small children do not fall to their deaths. 2 This is because the dominant theory in strata title is freedom of contract; that is, if by-laws are freely agreed through voting they are presumed to be legitimate. However, by-laws are not contracts. They are positive and negative obligations on land, ie private property rights facilitated by legislation. Property law has never naïvely believed that individual consent is sufficient to legitimise all property rights. Property rights are strictly limited, and as progressive theorists argue, the content of property rights must be determined by the legitimacy of the social and political relations that those rights create. Courts and legislatures must continue to use property law to disallow some of the choices that private citizens might make.



Cathy Sherry

Cathy Sherry is a leading Australian expert on strata and community title. She provides advice to government and the private sector on the complexities of collectively-owned property. Cathy's research focuses on the social implications of private communities, as well as optimal planning for children. Cathy has a special interest in urban farming and the challenges of providing growing space in high density cities.
Cathy is an academic member of the Australian College of Community Association Lawyers (ACCAL) and her postgraduate course*, Strata and Community Title Law*, LAWS8115, is the approved accreditation for membership of ACCAL. Cathy is a General Editor of the international property journal, Property Law Review. She is the author of Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties*, Routledge, London, 2017.

Wednesday 27 September 2017

2.00- 3.30pm - Parallel Session 1

Room 2.08

Contemplating the Commons

Chair: John Page

The Tragedy of (ignoring) the Semicommons

Robert Cunningham

We tend to think of property as either private or public. But of course the truth is much more complex. Most property is a combination of private and public interests. This paper synthesises the tragedy of the commons and the tragedy of the anticommons in order to alert attention to the benefits that accrue from the dynamic interaction between private and public uses of property. To dismiss these benefits is to succumb to the tragedy of ignoring the semicommons.



Robert Cunningham Curtin Law School

Throughout his professional career, Robert has engaged with the law in his capacity as both legal practitioner and academic. As a legal practitioner his efforts have concentrated on the provision of legal information, court advocacy and education within Community Legal Centres and the not-for-profit sector. He currently practices as a barrister within Murray Chambers, specialising in Federal Court matters with a particular emphasis on corporate law litigation concerning directors' duties, market misconduct, disclosure and corporate contracting. He also works in intellectual property and international trade law. As part of his active interest in public interest advocacy, Robert provides legal advice and court advocacy to not-for-profit organisations and consumer protection advocates.
In academia Robert's pursuits have primarily focused on the manner in which the law interfaces with international trade, sustainability, corporate accountability, and information regulation. He has published numerous academic journal articles and books, as both sole-author and co-author, primarily in the fields of corporate law, intellectual property and international trade law.
Robert is the author of "Information Environmentalism: a governance framework for intellectual property rights" published by Edward Elgar. The book applies analytical frameworks derived from environmental theory to construct a governance framework for the regulation of information in the 21st century. Reviews of this work can be found in the Oxford University Journal of Intellectual Property Law & Practice and the Queen Mary Journal of Intellectual Property. The book is also the subject of a presentation by Professor James Boyle from Duke University.
Robert has been embedded within various universities as a research scholar including the University of New South Wales, Melbourne University, Australian National University, University of California (Berkley), New York Law School, and Queen Mary College (London).
Along with a PhD from the Australian National University, Robert holds a Bachelor of Business (Accounting), Bachelor of Laws (Hons), Master of Laws (Hons), and a Graduate Certificate of Legal Practice from the University of Technology Sydney.
He currently teaches Corporations Law, Corporate Governance, and Professional Responsibility within the Curtin Law School; and World Trade Organisation Law at the Ghent Law School in Belgium.

Locating the Commons in Common Law

Sue Farran Faculty of Law, The University of Northumberland

This paper draws on research undertaken for the 'Commons Project' of the International Academy of Comparative Law. Using three different comparative approaches: operative rules, descriptive formants and meta-legal formants drawn from the work of Mattie and Bussani (1997) and Sacco (1991), national rapporteurs were asked to address a number of proposed scenarios in which a case for 'common(s) property' might be made. These included housing, food, water, nature, knowledge, care and culture.

While the idea of the global commons or the creative commons is becoming familiar, locating 'the commons' in the common law of England and Wales is a challenge. For a start there appears to be no definition of this notion at a national level, and remarkably little national debate. There is of course the history of enclosures and the loss of common ground, the emergence of commonhold for leaseholders to acquire freehold title, recognition of public rights of way, and the idea of common property between joint tenants who co-own. There is also the concept of public goods, such as the right to health care, to education, adequate infra-structure, law enforcement, defence and to other services provided by the state, and one might add the public benefit derived from property managed by charities. There is also the universal but at the same time individual, human rights dimension which may come into play where either the right to privacy and family life (Article 8 of the European Convention on Human Rights) is breached or threatened, or where the right to undisturbed possession of property is as risk calling on Article One, Protocol One of the European Convention of Human Rights. Debates and litigation about these rights start to introduce new dimensions into the conventional understandings of property.

What is less apparent in property law, but increasingly apparent in discourse about social, economic and cultural rights is property (perhaps in a rather broad sense of being a relationship between people and things) which escapes identifiable ownership but is in some way beneficially enjoyed by all or at least an unbounded number of individuals. There are however, indications of the loosening of the 'bundle of rights' and the emergence of new claims to the natural and build environment. Examples can be found in legislation facilitating access to the countryside and coastline, the resurgence of village greens, tolerance or even embrace of graffiti and guerrilla gardening by public and private land owners, the emergence of park runs and prohibitions on charging fees for this healthy leisure activity, and recognition of parkour as an official sport.

This paper draws on some of the case examples proposed by the Commons Project and presents the research to date.



Sue Farran

Having initially majored in English and Social Anthropology, I studied law in the mixed jurisdiction of South Africa before post-graduate studies in South Africa and at Cambridge. I have held posts at the University of KwaZulu Natal (Pietermaritizburg), the University of the West of England, the University of the South Pacific and at the University of Dundee, as well as teaching at universities in France and Malaysia. I am currently an Adjunct Professor at the University of the South Pacific and an Associate of the Centre for Pacific Studies at St Andrews University in Scotland.

To share and share unalike: communal property, the commons and collective private property'

Leon Terrill Faculty of Law, UNSW

In light of recent efforts to reconsider the commons, it is a good time to look more carefully at what a commons means and how it relates to other forms of sharing and differentiating rights. With a focus on land, this paper considers the meaning of terms such as communal property, collective private property, a commons and an anticommons. Often communal property and a commons are treated as synonyms, but this paper describes how drawing a distinction between the two concepts makes them both more intelligible. Commons are widespread and varied, and can be found on state property and private property as well as communal property and open access land. They are regular part of our daily interactions. Communal property is instead a particular form of shared ownership that we use when we are trying to allow space for local or alternative normative systems and governance arrangements. In Australia, this includes Indigenous land ownership and much land held by churches and clubs. In recognition of the impact that our actions have upon neighbours, elements of communal property are also incorporated into strata title (which is predominantly a form of private property). Discussions about shared property are made clearer if we recognise these different types of sharing.

While the commons has been the subject of extensive analysis, communal property has received much less academic attention. This is unfortunate, as assumptions are often made about the economic consequences of communal property, particularly with respect to Indigenous land. It has often been said that communal property a barrier to economic development, which is better served by individual ownership and private property. This particular framework for simplifying the relationship between property and economic activity has proved harmful. There are different types of collective ownership – including collective private property – and the particular consequences of communal property deserve greater attention.

Some of the more refined analyses of commons and anticommons tragedies are nevertheless relevant to communal property: those analyses which recognise that the potential for 'tragedy' occurs at the interface between the individual and the collective, rather than as a result of collectives per se. That interface is an inevitable part of collective enterprise and can be structured in many different ways, each with consequences for the way economic activity occurs, as well as for how people relate and values evolve. More limited frameworks for categorizing property (such as a simple distinction between a commons and private property) tend to obscure rather than illuminate the range of options and their consequences.



Leon Terrill

Dr Leon Terrill is a senior lecturer in the UNSW Law School, a Research Director at the Indigenous Law Centre and General Editor of the *Australian Indigenous Law Review*. He primarily researches issues affecting Indigenous land and his book *Beyond Communal and Individual Ownership: Indigenous Land Reform in Australia* (Routeldge 2016) is the first full-length monograph on the recent Australian reforms. Previously, Leon worked as a senior lawyer for the Central Land Council in Alice Springs.

Protest, Property and the Commons (Skype)

Lucy Finchett-Maddock, School of Law, Politics and Sociology, University of Sussex

In this discussion, Lucy will elaborate on her recent monograph on squatting, property and protest 'Protest, Property and the Commons: Performances of Law and Resistance' (Routledge, 2016). The book's research is based on the

alternative property narratives of 'social centres' (political squats) and how the spaces and their communities perform and practice their own form of *social centre law* or *law of resistance*. The work hopes to relay what these practices can teach us in terms of understanding the integral role of property in both law and resistance, as well how we may understand more communal forms of legal, propertorial relations.



Lucy Finchett-Maddock

Lucy Finchett-Maddock is Lecturer at the School of Law, Politics and Sociology, University of Sussex, UK. Her research looks at critical legal, legal geographical and entropic explorations of law, resistance, property, aesthetics, and politics.
Books: Protest, Property and the Commons: Performances of Law and Resistance
Lucy's work predominantly focuses on the intersection of property within law and resistance, interrogating the spatio-temporality and aesthetics of formal and informal laws, property (squatting and housing), commons and protest. She is author of monograph 'Protest, Property and the Commons: Performances of Law and Resistance' (Routledge, 2016).

Her work also looks to broader questions around the intersection of art and law, resistance, legal and illegal understandings of art, property, aesthetics and politics. She is currently developing an 'Art/Law Network' (in collaboration with Sussex's Art and Law Research Cluster), where artists, activists, lawyers, practitioners and other such agitators can share their work and ideas, create art projects on law; law projects on art; collaborate on methodological and pedagogical approaches to law, through art; art, through law - and anything else in between.
Lucy uses the thermodynamic property 'entropy' a lot in her work, in relation to law, resistance, aesthetics which explains nonlinear and linear relations of time through understandings of complexity theory (see 'Seeing Red: Entropy, Property and Resistance in the Summer Riots', Law and Critique, 2012).

Wednesday 27 September 2017

2.00- 3.30pm - Parallel Session 2

Moot Court

Enduring Property Relationships within Families

Chair: Allison Silink

Decisions, Decisions: Gender Norms and Intention in Establishing a Beneficial Interest in the Family Home

Kate Galloway Faculty of Law, Bond University

Two recognisable elements that underpin the distribution necessary to support a claim for a beneficial interest in the family home are intention and contribution—where the latter frequently supports the requisite intention to create a beneficial interest. Since the early English cases of *Pettitt v Pettitt* and *Gissing v Gissing*, the courts have however, had some difficulty settling on the nature of intention sufficient to indicate distribution of the beneficial interest. The cases variously find the standard to be actual, implied, and imputed intention. While the importance or otherwise of these categories has been debated, the underlying purpose of intention remains establishing the parties' own free will as to the distribution of property. Unlike property redistribution within a family law framework, courts' role in a general law property dispute is to ascertain the parties' own distribution. Yet in adopting the general law approach, ostensibly designed for the market transaction, courts have struggled to accommodate the intimate context of claims for a beneficial interest in the family home. The more hard line approach of earlier cases has apparently softened somewhat in recent years in recognition of the multitude of factors relevant to considering intention as to property distribution. Despite this, there is no recognition of the complexity and likely impact of gender norms on the way in which a couple makes decisions affecting their economic resources, including their property.

This paper draws on sociological literature establishing the role of gender in couples' financial management decisions. Against this background, it examines case law to illustrate the problem with drawing conclusions about intention as to property in the absence of accounting for gender. In the first place, it suggests that law's approach is redolent of transaction, where intention serves the role of establishing the parties' acquiescence as to property distribution. Further, it identifies that intention in a transactional sense fails to comprehend the likely gendered nature of parties' decision-making in the intimate context. In doing

so, the law's preference for transactional modes of decision-making and therefore expression of intention, establishes gendered benchmarks for success in claims for a beneficial interest.



Kate Galloway

Kate has been a legal academic since 2004, specialising in property law and legal education. She is a nationally recognised law teacher whose teaching is informed by both her scholarship and her experience as a solicitor in private practice and in a native title representative body.
Kate publishes and presents both in Australia and internationally in academic, professional, and community contexts. Her work encompasses legal education, property - particularly land tenure, sustainability, social justice, and gender equality. She is the deputy editor of the Legal Education Review, and the Queensland editor of the Alternative Law Journal.
In addition to her academic writing, Kate contributes regularly to various media outlets as a commentator on contemporary social justice issues, especially concerning gender equality. She is active on social media, blogging at https://kategalloway.net/.
Throughout her career, Kate has been involved in the community legal sector, including having worked to establish the North Queensland Women's Legal Service and currently serving on the management committee of the EDO (NQ).

Gender and the Reform of Family Property: The promise of equality

Mary Jane Mossman Osgoode Hall School of Law

This paper is part of a major historical research project about gender and the reform of family property in law in the 19th and 20th centuries in Canada. Reflecting Kevin Gray's assertion that 'the law regulating the spouses' property relations is fundamentally an index of social relations between the sexes' (Gray 1977:1), the project explores the texture of gendered social relations that were often embedded within legal reforms to 'family property,' including 19th century married women's property statutes as well as the equal property regimes enacted in the second half of the 20th century. In doing so, the project assesses the claim of feminist historian Judith Bennett that historical developments more often produce 'changes' in women's lives rather than 'transformation' in their status; as she argued, changes 'that might have advanced women [have too often been] countered effectively by responses rooted in ideology, law, politics and family' (Bennett 1997: 73 at 82).

Although the major project focuses primarily on the social and legal contexts in Canada, it takes account of similar developments in the UK, in neighbouring states in the USA, and in other common law jurisdictions, including Australia. However, my paper for this conference focuses more specifically on the social and legal contexts in relation to reforms occurring in Ontario in the 1970s (the same decade in which Australia first enacted its *Family Law Act 1975*). Significantly, recommendations of the women's movement in Ontario, as well as the Ontario Law Reform Commission, resulted in widespread public consultations and controversial debates in the provincial legislature about the need to reform family property law and other issues with respect to economic (re)adjustment at marriage breakdown. The result was Ontario's *Family Law Reform Act*, enacted in 1978, which purported to create equal property rights for married spouses at divorce or separation, regardless of actual title to property. From a Property Law perspective, the statute represented a remarkable reform of traditional principles of the law of property. However, in spite of reformers' aspirations for this new approach to 'family property,' it is arguable that gender ideology about the 'family' – and traditional ideology about rights to 'property' – significantly constrained these reforms, in both judicial decisions and ongoing public debates.

In relation to the larger project, this paper offers an examination of relationships between gender goals and prevailing societal norms that reveal a significant challenge for 'family property' reforms: how to balance Property Law's emphasis on autonomy, exclusivity and individualism with Family Law's relational goals of spousal equality, fairness and economic partnership. In such a context, while the 1978 reform statute resulted in some 'changes' for (some) women, I argue that it did not achieve 'transformation' in women's status. My proposal seeks to engage with the conference themes about 'individual and collective decision making' about property during marriage – and at divorce/separation; and also to explore how a gendered critique of 'family property' illuminates the limitations of 'enduring property relationships' in families.



Mary Jane Mossman

Professor Mary Jane Mossman has taught at Osgoode Hall Law School since 1977, after several years as a member of the Faculty of Law at the University of New South Wales, and has served as Associate Dean, Assistant Dean, Chair of Faculty Council, and now Director of the Institute for Feminist Legal Studies. Her research interests include women and the law/legal professions; family law, social assistance, and economic dependency; property law, including trusts and pensions; access to justice and legal aid. She has been awarded an honorary doctorate of the Law Society of Upper Canada, the Medal of the Law Society of Upper Canada, the Award of Excellence of the Canadian Association of Law Teachers, a Canadian Bar Association (Ontario) Distinguished Service Award, and the annual award of the Advocacy Resource Centre for the Handicapped. In 1995, she held the Gordon F. Henderson Chair in Human Rights at the University of Ottawa, and was awarded the Walter L. Gordon Fellowship at York University in 2004. In 2007, she received the Bora Laskin Fellowship in Human Rights as well as the Ontario Government's Leadership in Faculty Teaching award, and she was also appointed University Professor at York. She has also been a Visiting Professor at a number of other law schools. Professor Mossman has been involved, both in her legal scholarship and her community activities, in a variety of issues relating to legal aid and access to justice. She was the first Clinic Funding Manager of the Ontario Legal Aid Plan, with responsibility for community legal clinics from 1979 to 1982, and currently serves as Chair of the Administrative Committee of the CAW Legal Services Plan. She is the author of numerous scholarly articles, as well as reports for government and other organizations. In 2004, she published *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond-Montgomery, 2004); and co-authored a second edition of *Property Law: Cases and Commentary* (Toronto: Emond-Montgomery, 2004). Her most recent book is T*he First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Oxford: Hart Publishing, 2006).

What Role for Caveats in Protecting an Older Persons Interests in a Failed Assets for Care Arrangement?

Teresa Somes, Faculty of Law, Macquarie University and Eileen Webb, Curtin Law School

When an older party transfers assets such as the family home to another, usually an adult child, in exchange for accommodation and care both parties may benefit. Yet there is real potential for relationships to break down, or for circumstances change so as the arrangement can no longer continue. As the ALRC noted in its recent discussion paper;

> [W]hen things go wrong, the absence of a clear written agreement, may mean that the arrangement is unenforceable and the older person may find themselves homeless and having lost the proceeds of their family home, which they invested under the family agreement.[1]

The purpose of this paper is to examine how the Australian law concerning caveats presents challenges for an older person when they attempt to secure a remedy should an asset for care arrangement fail. The nature of the older person's interest is crucial in determining whether they will be permitted to lodge a caveat to protect the property against dealings by the title holder. Subsequent dealings could have a direct impact on the outcome of any action taken to either recover part or all of the property or its use as security for an order for compensation, or could have a bearing on any subsequent priorities dispute. Given that the range of interests applicable to an asset for care situation is varied and dependent upon the nature of the individual family negotiations, many older people are faced with not only the burden of establishing an interest, but are unable to protect it in the process. For instance, the available causes of action give rise to a number of potential discretionary remedies which may or may not result in a proprietary interest. Even so, even the remedy of a resulting or constructive trust will not be caveatable until such time as the court declares the interest under the trust exists.

In our view, the history of uncertainty surrounding the status of rights giving rise to a proprietary interest demonstrated by the reasoning in cases such as *Latec Investments v Hotel Terrigal*[2] along with the unique circumstances arising from an asset for care situation warrants further scrutiny. We propose a number of alternative approaches to enable in the law to protect the vulnerable legal position of the older party in these circumstances.

[1] Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2017) para 8.9.
[2] [1965] HCA 17



Teresa Somes

Teresa graduated with degrees in Arts and Law from the Australian National University, and is admitted as a barrister and solicitor of the ACT Supreme Court. She is currently undertaking her PhD through the University of South Australia, examining the legal position of the older person in an asset for care arrangement. The thesis highlights the limitations of the present law and puts forward proposals for reform.

Teresa has presented her research at conferences in Australia and New Zealand, and has co-authored several articles with Professor Eileen Webb concerning older people and family accommodation arrangements. Her work has been cited in the recent ALRC report into elder abuse.
Teresa is at present an associate lecturer at Macquarie University where she teaches equity and trusts, and property law.



Eileen Webb

Eileen joined the Curtin law School is 2016. She is the Director of the Consumer Law and Small Business Law Discipline and has introduced the elder law program. She teaches and researches in real property law, particularly housing and tenancy law, competition and consumer law (including small business law) and elder law. In August 2017 Eileen was appointed to the Law Reform Commission of Western Australia. Eileen is an author (with Sitesh Bhojani) of Statutory Unconscionability in Australia (Federation Press, 2018)

Norms of Sharing and Exclusivity: Adverse Possession and Co-ownership

Robyn Honey, Faculty of Law, Murdoch University

The law of real property is premised upon the assumption that each of us will jealously guard that which is ours. Indeed, it insists that we do so. The doctrine of adverse possession gives the landowner a limited time to protect her rights against 'others' and ownership itself is contingent upon her vigilance doing so. However, in the context of co-ownership adverse possession must operate rather differently, because where land is shared there are no boundaries to patrol. Sole occupation does not of itself constitute dispossession. Furthermore, co-ownership very often occurs in the context of families and other close and enduring relationships, in which norms of sharing and concern to preserve the relationship prevail. In these circumstances, the premises upon which adverse possession is based are inappropriate and the doctrine often works unfairly. This paper examines: the roots of adverse possession in the statutes of limitations, its public policy justifications and its rationale in modern Australian land law. The paper will deal, in passing, with the relationship between adverse possession and the related but distinct concept of prescription and the attitude adopted in each to the act of acquiescence. It considers some of the measures that have been taken in the courts to minimise this problem and considers the possibilities for a more principled way forward.



Robyn Honey

Robyn commenced her teaching career at the University of Western Australia in 1988 and has been a member of the Murdoch faculty for two years. She holds a current practising certificate. Robyn's teaching experience has centred around equity, property law and their intersection – trusts. She enjoys teaching the legal process; legal research and writing; and competition law. Her research primarily focuses on equity and property law. It also encompasses remedies, trade practices law and intellectual property law. She has a particular interest in the jurisprudential concept of 'conscience' and the role that it plays in Australian law.

Wednesday 27 September 2017

4.00 – 5.30pm - Parallel Session 1

Room 2.08

Chair: Ben France Hudson

Regulating Private Property

Chair: Ben France Hudson

Sharing Ownership at private property's edges

David A. Dana[3] & Nadav Shoked[4]

All private properties inevitably have edges where the claims of private ownership and public ownership collide. Consider a house held in fee simple. Around one edge of the house is a sidewalk. Is the sidewalk the private property of the homeowner or the city's property? Underneath the house there are sewer lines, one running from the street to the house. Is that line the homeowner's property or the city's? Above the house there is space: air. Does any of it belong to the homeowner, or is it the property of the city? If the house backs onto a beach and land accretes, expanding the beach, is that new sand at the house's edge owned by the homeowner or by the public?

Property law often frames these "edges" questions in an either-or fashion: the place at the edge, whatever its physical nature, is either private property altogether or public property altogether. It follows that normally, as a legal matter, either the private property owner enjoys the full rights and responsibilities of private property ownership with respect to edge, or the government acting on behalf of the public does.

But that is theory and in practice, the law is muddled and not necessarily determinative of what private property owners and governments do about edges. Ever shifting regulations placing duties on formal owners of the edges or removing liberties from them are not only opaque but often explicitly unenforced. It is thus unclear what the private homeowner's rights and responsibilities are with respect to a sidewalk or some other edge. Moreover, few property owners ever think through the fuzzy questions of edge ownership before acquiring title to a house—indeed, before a problem pertaining to the edge emerges.

This Article argues that the either-private-or-public approach to edges ignores the much more nuanced lived reality of these spaces. In actuality the public holds a major interest in edges, but the owner of the abutting private property has (as compared to other members of the public) a disproportionately large stake in what lies at the edge of her private property. If the law were to reflect these public and private stakes, it would, we argue, treat the public and private property owners as effectively co-owners of the edges, with the symbolic and actual rights and responsibilities that attend co-tenancies.

There would be benefits to recognizing co-ownership as the default rule for edge properties. A co-ownership rule might help avoid the socially undesirable results where private property owners are demoralized by denials of all control over edges currently defined as "their" property. Concurrently, the rule would avoid the socially undesirable result wherein governments deemed owners of edges skirt their responsibility towards them, hoping to shift costs on the abutting private property owners. A co-ownership legal regime should generate a more efficient management regime since it tracks the actual interests of the public and adjacent private property owners.

Moreover, recognizing co-ownership at private property's edges might help us think in a more nuanced way about the relationship between private property and public property in general. Private property's edges unsettle the notion of absolute ownership of private property, by highlighting the ever-present public stake in a private asset. Similarly, the concept of edges accounts for the tendency of individuals and local government to act as if certain formally public spaces, such as streets or greenery in front of private homes, belong to the neighboring homeowners "more" than to the public at large.

[3] Kirkland & Ellis Professor of Law, Northwestern University Pritzker School of Law.
[4] Associate Professor of Law, Northwestern University Pritzker School of Law.



David Dana

David Dana is a leading scholar in the fields of environmental law, property, land use, and professional responsibility. Before becoming a professor, he was a litigator in both the private (Wilmer, Cutler & Pickering) and public (U.S. Department of Justice) sectors. He taught at Boston University before joining Northwestern, and has been a visiting professor at Harvard and Virginia as well several foreign universities. His work on the Takings Clause has been very widely cited, as has his writing on the ethics of aggregate legal representation. His current scholarly work focuses on a range of topics, including environmental and health risks posed by emerging technologies, climate change adaptation, the foreclosure crisis, and attorney fees and fee alternatives.



Nadav Shoked

Nadav Shoked joined the Northwestern faculty in 2012 as an Assistant Professor of Law. Previously, he was a Visiting Assistant Professor at the University of Texas School of Law. His work focuses on the law and theory of property, on local government law, and on American legal history.

- Local Government
- Legal History
- Land Use Planning
- Property Law

Soaring through the gaps – Drones and the legal protection of a landowners rights to airspace.

Elle Farris

A landowner's rights to airspace has always been an interesting quirk in property law. Gone are the days of "heavens to the hells" ownership of land, in which a landowner possessed the surface, the subsoil and airspace. Over the centuries this package of rights once vested in a parcel of land has eroded.Today, landowners only enjoy the airspace above their land insofar as they can claim a right to the use and enjoyment of a part of it. However, this limited protection does little for a landowner who is faced with the new phenomenon in aeronautical technology – the drone. A drone has a variety of purposes; from delivering goods, providing entertainment or something as sinister as air strikes, it also has a significant impact on a landowner's rights to airspace.

What of the drone that hovers annoyingly over a landowner's property? What of the constant overflights by a corporate entity delivering packages over a flight path that, on the basis of efficiency, crosses over a suburban neighbourhood? Should these landowners have to be subjected to such interferences with the airspace above their land? Surely not. But what does the law offer an aggrieved landowner in this situation? This thesis will demonstrate that both the common law and existing statutes leave little to the imagination when it comes to airspace protection in the face of the rise of the drone. Does this mean that landowners should resort to vigilantism in an attempt to reclaim their airspace? Should drone operators have to face the consequences of a landowner taking action into their own hands by damaging or destroying their latest gadget?

The answer to all of these questions is a resounding no! This thesis will argue that the law must be prepared to advance with the society in which it operates. It must be proactive to close the gap between its existing shortfalls both legislatively and at common law. To do this, this thesis posits the introduction of a civil penalty regime that aims to regulate the use and misuse of drones whilst protecting the rights of a landowner to airspace. This civil penalty regime will overcome the limitations of the common law and the narrow legislative focus of safety. Further, the civil penalty regime will establish a system accessible by all who feel aggrieved, yet will set clear parameters for those who wish to take advantage of the twenty-fist century and all that which it has to offer in the form of the hovering, darting and weaving drone.



Elle Farris

Elle Farris will tutor Property Law at Curtin Law School in 2018. Elle is a recently admitted lawyer, working in the Disputes and Investigations team at Allens in Perth. Elle Farris completed her Bachelor of Laws (Distinction) and Bachelor of Arts (European Studies major) at the University of Western Australia, graduating in November 2016. Elle's research concerns the legal protection of a landowner's rights to airspace. In particular, it considers how a landowner's rights are affected by the new phenomenon in aeronautical technology, the drone.

The State's Duty to Protect the Property of Private Landowners against Unlawful Occupation

Sarah Fick, Faculty of Law, The University of Capetown

In 2005, Prof Van der Walt published an article on the effect of *President of the Republic of South Africa v Modderklip Boerdery* 2005 (8) BCLR 786 (CC) on the duty of the state to protect landowners against the unlawful occupation of their properties. He suggests that this case might contradict the finding, in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC), that the primary duty to protect private property against unlawful occupation fell on the relevant landowner. Twelve years after the publication of this article, landowners are raising this argument against the state.

The Western Cape High Court, in *Fischer v Unlawful Occupiers, Erf 150, Philippi* case no 9443/14 (as well as two joined matters), is currently hearing an eviction application of around 60 000 unlawful occupiers. The landowners argue that the state has failed to fulfil its duty to protect their properties against unlawful occupation. The purpose of this paper is to determine whether this argument holds water. This involves considering what duties the Constitution places on the state and the landowner. It also includes considering which organs of state, if any, are burdened with this duty, as well as the extent of the duty. As Prof Van der Walt indicated, the rights of the unlawful occupiers must also be taken into account. Hence, the paper also considers how the right of unlawful occupiers, as well as evolving eviction case law, might affect the state's ability to prevent unlawful occupation.

Sarah Fick



Sarah Fick is a lecturer at the University of Cape Town, South Africa. She completed her LLB at Stellenbosch University and graduated from there with her LLM (cum laude) in 2012. Her research interest is in socio-economic rights, with a focus on housing and eviction law. Sarah's PhD was accepted for graduation, with the ceremony taking place at the end of this year. Her PhD considered the court's power to order the state to provide alternative accommodation to unlawful occupiers facing eviction. Sarah is also an admitted attorney and conveyancer.

Wednesday 27 September 2017

4.00 – 5.30pm Parallel Session 2

Moot Court

The Conundrum: Community v Exclusivity (2)

Chair: Toni Collins

Developer Conflicts of Interest and Governance Responsibilities in Transitioning Multi-Owned Developments

Nicole Johnston

Abstract: The multi-owned development (MOD) is a unique property type consisting of at least two individually owned lots tied to communally owned common property with a separate registered entity (the body corporate) created to govern and manage the property. While the body corporate is the ultimate governing entity and the orchestra of operations for much of a MOD's life, there is a period of time when a MOD's developer makes governing decisions. It is during this phase, the transition phase, that the developer can bind the body corporate to a myriad of arrangements and relationships. Although state based Australian legislation provides a framework for body corporate governance, concerns have been raised over the extent of power and control exerted by developers when tasked with governing.

There is a paucity of academic research concerned with the MOD transition phase. This study is therefore exploratory in nature, as it seeks to uncover the nature of governance decisions made by developers during the transition phase. This study is guided by the principles of the grounded theory method, which focuses on creating conceptual frameworks or theories through building inductive analysis from the data collected. Method triangulation was used in order to promote rigour in the research.

Semi-structured interviews were undertaken as the first empirical data collection phase in order to identify the challenges associated with establishing MODs from a range of stakeholder perspectives. Developer related conflicts of interest was the most predominant theme emerging from this initial analysis. The findings from this interview phase led to the development of

the main research question underpinning this study: *to what extent do conflicts of interest (COIs) detract from the way that developers uphold their governance responsibilities during the transition phase of multi-owned developments (MOD)?*

As the body corporate is a statutory creation and the legislation regulating it provides a framework for governance, the legislation and associated regulations relating to MODs were analysed in the study's document analysis phase. This analysis laid the basis for identifying two distinct developer governance decision-making periods occurring during the transition phase (the planning phase and the developer control period). Distinct developer governance decisions made during these two periods have been identified and their nature examined.

Finally, structured interviews were undertaken. The questions posed during this phase of the research were informed by insights deriving from the prior empirical phases employed, a review of the pertinent literature and relevant case law.

Drawing on the literature relating to governance, governance responsibility, conflicts of interest, and this study's empirical observations, an examination of the extent to which developers are responsible for the governance decisions made while controlling the body corporate has been undertaken. In addition, an examination has been made of the extent to which developers should be required to promote good governance practices consistent with facilitating long-term functionality and viability was undertaken.

The study's findings reveal the high extent to which developers are responsible for the governance decisions made during a MOD's transition phase. The findings also show that while developers have considerable unfettered authority to make decisions during the transition phase, this phase coincides with opportunities for developers to further their commercial interests. The lure of these opportunities highlights a tension between a developer's interest in maximising commercial gain and their MOD governance responsibilities. To dispense appropriately their governance responsibilities, developers need to exhibit a capacity to exercise self-interest restraint, a factor that lies at the heart of the governance responsibility model. It appears developers are not sufficiently held accountable for their governance decisions, and this contributes to scheme dysfunctionality. This deficient accountability provides a freedom of action license to developers that results in lot owners, having to manage through, and attempt to mitigate, developer-induced dysfunctionalities



Nicole Johnston

Dr Nicole Johnston is an admitted Legal Practitioner currently working as a Lecturer and Researcher in the Department of Finance, Property and Real Estate discipline at Deakin University. She teaches Property Law in the undergraduate and postgraduate property courses within the Deakin Business School and is the Director of Industry Engagement.
Nicole researches strata related topics from a socio-legal perspective. Her PhD thesis examined how conflicts of interest detract from developers upholding governance responsibilities in the transition phase of multi-owned developments.
Nicole is the Chair of the International Research Forum on Multi-owned Properties, a multi-disciplinary research conference held annually in Melbourne.

Learning to Live the Higher Life? Towards Better Recognising 'Community' in Multi-Owned Tower Blocks

Clare Mouat School of Agriculture and Environment, University of Western Australia



Clare Mouat

Clare Mouat is a Lecturer in Human Geography and Planning at the University of Western Australia where she researches community relations, urban governance, strategic metropolitan planning, political theory, and urban futures. Her key works showcase her passion for planning inclusive and just cities: from her award-winning PhD *Rethinking Community in Planning: A review of the role of planners and citizens in building strong communities*) to recent articles on 'recognising "community" in multi-owned property law and living' (2015), super-sizing cities, and using conflict productively in planning. She enjoys collaborating with others from different disciplines and life experiences in areas of growing importance to 21st century urbanism focusing on housing and community in multi-owned developments. In 2016, along with Dr Rebecca Leshinsky she co-convened the inaugural Comparative Social Sustainability Symposium held in Barcelona: 'Living the high life? addressing the social sustainability challenges of condominium law, living, and landscapes'. She champions political thinking about how we learn to disagree, to live harmoniously in high-rise housing, and to plan for community governance in smaller and larger cities.

The Governance of Strata Title and Law Reform in Queensland

Professor Michael Weir

Significant law reform is currently being undertaken in Queensland by the Commercial and Property Law Research Centre of the Queensland University of Technology. This research centre is undertaking a review of Queensland's property laws for the Queensland Government involving an examination of issues arising under legislation governing ownership, use and dealings in property in Queensland including the *Property Law Act 1974* and the *Body Corporate and Community Management Act 1997*. This is the most significant review of property law in Queensland since the enactment of the Property Law Act 1975.

The purpose of this paper is to focus on one area that relates to the theme of this conference 'Beyond Sole Ownership.' In this review considerable attention has been focussed on the reform of Strata Title legislation in Queensland. This area of property law that has seen substantial dispute between stakeholders including Bodies Corporate, Body Corporate Managers and Lot owners often involving the fairness of financial arrangements and decision making processes. One recent report from this law reform process was the 'Property Law Review Lot entitlements under the Body Corporate and Community Management Act 1997 – Final Recommendations.' This report denotes the under the heading 'A difficult History' that the current strata title Queensland legislation in regard to unit entitlements involves complex and difficult to apply provisions and problematic transitional provisions and legislative backflips. The reasons for these impacts will be discussed. This problematic history reflects the level of disputes that have arisen in relation to this area and the pressure placed on government to resolve disputes and to reform the law. The particular issues involved in strata title are complex and subject to dispute for a number of reasons involving the reality that it involves large numbers of people living in close proximity where although they have separate ownership of a lot they are at the same time joint owners of common property.

Drawing on the conference theme and the concepts elucidated in Cathy Sherry's book, 'Strata Title Property Rights Private Governance of multi-owned properties, Routledge 2017 and other authors the paper will discuss the theoretical concepts at the basis of the establishment and development of Strata Title and the practical issues which leads to good governance of what is increasingly the preferred type of urban property ownership. The paper will also make reference to the implications of this form of property ownership and regulation beyond Queensland.

The significance of this area is reflected in the view expressed that Bodies corporate are often regarded as the 'fourth tier of government'.[5] Unlike a government, however, bodies corporate are a collection of private individuals who voluntarily enter into an arrangement to collectively own private property but also to own and maintain common property. The paper will also deal with the issue of dispute resolution which has become particularly important in Queensland in relation to financial matters and dispute resolution associated with bylaws, general meetings and contribution levies. Within these issues considerations relevant to the role of democratic principles in the alleviation of disputes and the application of accepted governance of jointly owned property will be canvassed.



Michael Weir

Michael has broad professional experience as a solicitor in private legal practice in commercial and property law. In his academic career Michael has published on Land Law, Planning Law and Complementary Medicine and the law. He is a co- author of the textbook Real Property Law in Queensland, LBC (4th edition, 2015). Michael has a research interest in Medicine and the Law with a focus on complementary and alternative medicine and law and ethics. This interest is reflected in the textbook Law and Ethics in Complementary Medicine Allen and Unwin (5th edition 2016).

[5] Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia' (2009) *Housing Studies* 24(2), 243-259 at 248

Plenary Session 2: Thursday 28 September 2017

Chair: Robert Cunningham

The Psychology of Property Law

The idea of property has several different names in the legal literature, including 'psychological ownership', 'psychology of property', 'vernacular law', and 'living law'. These approaches share a concern for the everyday beliefs that people hold and use to negotiate their own rules, norms and practices, and these beliefs about property constitute an undeniable form of law. Yet although property is the subject of much theorising, very little is known about how ordinary people think about it.

'The Psychology of Property Law', a ground-breaking qualitative study conducted at the Adelaide Law School at The University of Adelaide, directly confronts this gap in the knowledge. This pilot project (2013-16) was led by Professor Paul Babie, Associate Professor Peter Burdon and Dr Francesca da Rimini. They collected, analysed and interpreted the informal, everyday beliefs about property held by a sample group of South Australian residents, an iterative process that generated an emergent theory about the idea of property.

To our knowledge, this is the first study in Australia empirically to examine common attitudes about property. Property rights are central to Australia's social fabric. Tensions and litigation are increasing between owners and between individuals, governments and multinational corporations. By investigating property's social and psychological dimensions, this project offers a unique insight into what underlies these disputes, and how they might be resolved.



Paul Babie

Dr Paul Babie holds a Personal Chair of Law in the Adelaide Law School of The University of Adelaide. He holds a BA in sociology from the University of Calgary, a BThSt from Flinders University, a LLB from the University of Alberta, a LLM from the University of Melbourne, and a DPhil in law from the University of Oxford. He is a Barrister and Solicitor (inactive) of the Court of Queen's Bench of Alberta (Canada), and an Associate Member of the Law Society of South Australia. His primary research interests include critical theory, private law theory, and property theory. He has published and spoken extensively in these fields and teaches property law, property theory, and Roman law.



Dr Francesca da Rimini

Dr Francesca da Rimini is a research associate both at the Adelaide Law School of The University of Adelaide, and also in the Social and Political Change Group of the Faculty of Arts and Sciences, and in the Human-Centred Technology Design research centre of the Faculty of Engineering and Information Technology, at the University of Technology Sydney. She holds a DipT and a BEd from the South Australian College of Advanced Education, and an MA and PhD in humanities and social sciences from the University of Technology Sydney. She also has a long history as an artist and writer in the field of media arts, and was a founding member of the cyberfeminist art group VNS Matrix. Her research interests include historic and new collective forms of political agency and mobilisation, precarious labour in the academy and the cultural production sector, emergent forms of knowledge production and property exchange within informational capitalism, and experimental poetics.

Thursday 28 September 2017

11.30 – 1.00 pm - Parallel Session 1

Room 2.08

Enduring no more – concluding property relationships

Chair Lynden Griggs

A new metaprinciple of Land Law: Private Compulsory Acquisition

Brendan Edgeworth (The University of New South Wales)



Brendan Edgeworth

Brendan has been a member of the academic staff at the UNSW Law School since 1989. In his time at the School, he has been Director of Teaching (1997-2000), Associate Dean (Undergraduate) (1999-2001), Head of School (2008-2012), and Director of Postgraduate Studies (2013-2016). Prior to his appointment he taught at Macquarie Law School (1982-8). Brendan has held positions as Visitor at Stellenbosch University (2013), Warwick University (2006), National University of Ireland, Galway (1999), the International Institute for the Sociology of Law, Onati, Spain (1995) and Trinity College Dublin (1988). In 1978 he was Senior Research Assistant at the National Law Centre, George Washington University. Brebdan was appointed Visiting Fellow at the European University Institute in Florence in Semester 2, 2016.

Brendan's research interests span most of the areas in which he teaches, as is reflected in books such as: *Butt's Land Law,* 7th ed, Thomson Reuters, (2017); *Law and Poverty in Australia: 40 Years after the Poverty Commission*, Federation Press, Leichhardt, NSW (2017) (with Andrea Durbach and Vicki Sentas); *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, Federation Press, Leichhardt, NSW (2015) (with Sean Brennan, Megan Davis and Leon Terrill); *Sackville and Neave: Australian Property Law,* 10th ed, LexisNexis, Sydney (2016) (with Chris Rossiter, Pam O'Connor and Andrew Godwin), the most widely prescribed property law text in Australian law schools; and *Law*, *Modernity*, *Postmodernity: Legal Change in the Contracting State, Ashgate*, Aldershot, UK (2003). In addition, his research and publications cover the areas of law and social theory, and legal history. Brendan's research is also directed to the reform of housing law and property law. As well as making frequent submissions to government and law reform bodies, he has been engaged as a consultant to the New South Wales Law Reform Commission (1996), and was a member of the Board of the Tenants' Union of New South Wales from 2004-12. In 2015 he received the Vice Chancellor's Award for Teaching Excellence (Postgraduate Research Supervision).

Interpreting Compensation for Loss or Impairment of Native Title

Margaret Stephenson (The University of Queensland)

In 2016 for the first time, the Federal Court in *Griffiths v Northern Territory* considered the calculation of compensation for loss or impairment of native title under the *Native Title Act 1993* (Cth). Mansfield J made a determination as to the compensation payable by the Northern Territory Government to the native title parties regarding certain specific areas in Timber Creek, a town in the Northern Territory, where native title had been extinguished or impaired by past government acts, including land tenure grants and public works. The compensation claim was preceded by an earlier determination of native title in which the Ngaliwurru and Nungali People were found to have held native title. The Court ordered the payment of $3,300,261 million compensation to traditional owners based in three parts as follows:

- The value of the native title interest: $512,000 was assessed as 'economic loss', based on 80 per cent of the freehold land value at the relevant time.
- Calculation of interest: $1,488,261 million interest was payable assessed on the economic loss and calculated as simple interest.

- Compensation for non-economic loss: $1,300,000 million was the amount determined for 'solatium' or non-economic/intangible loss, in recognition of the loss of the spiritual connection and traditional connection with the land. This was made on an “in globo” assessment.

This paper will critically evaluate the following:

- the basis of assessing compensation for the acquisition of “standard” land tenures,
- the relative value of non-exclusive native title rights, calculations of interest on compensation payable, and
- critically how ‘solatium’ has been quantified.

The decision in *Griffith* is subject to appeal on all issues apart from the date on which the entitlement to compensation arose, i.e. the date the extinguishing or impairing acts were undertaken and not the date on which such acts were validated by legislation.



Margaret Stephenson

Margaret Stephenson is an Associate Professor at the TC Beirne School of Law at the University of Queensland, Australia

Please Government: I want an offer back on my land that you took…at a fair price! Section 40 Public Works Act 1981 (NZ)

Elizabeth Toomey School of Law, The University of Canterbury

This paper addresses the themes of decision-making (in this case, that of the New Zealand government) and of the relationships between present and subsequent interests in real property. Section 40 of the Public Works Act 1981 (NZ) -a seemingly straightforward statutory provision preserving the rights of former owners from whom land has been taken for a public work when that land is no longer required – has been scrutinised by the New Zealand courts at all levels. Several recent decisions demonstrate the complexities that can arise.



Elizabeth Toomey

Elizabeth specialises in the areas of real property law, resource management law, public works and sports law; and is a barrister of the High Court in New Zealand. She publishes widely in her areas of expertise both in New Zealand and internationally. She has presented papers at numerous conferences, is both General Editor and co-author of ThomsonReuters New Zealand Land Law (3 ed, 2017) and is a regular contributor to Butterworths Conveyancing Bulletin. She has advised the New Zealand Law Commission on real property issues and undertakes consultancy work for the legal profession. She plays an active role in the wider university environment.

Demolition, silt, waste, pests, population shift: Canterbury coping with its damaged land

Toni Collins, School of Law, University of Canterbury

In 2010 and 2011 a number of large earthquakes struck Christchurch together with thousands of smaller aftershocks. They had a significant impact on the land and the city’s “clean green” image. As a consequence of the earthquakes air quality was affected through liquefaction silt, dust and open fires and water quality through liquefaction silt and damage to city infrastructure such as drainage and sewerage pipes. As a result of the central business district being inaccessible for more than two years, there was an increase in unwanted pests. There was also a population shift from suburbs within the city to areas on the outskirts which caused an increase in traffic on main roads and pressure on resources in areas that were not prepared for such a sudden growth in population. Finally, the extreme shaking brought about by the earthquakes caused commercial buildings to collapse and damaged hundreds of others so they had to be demolished. A large number of residential properties were also damaged beyond repair, in some areas whole suburbs, and these were also demolished. This destruction created a significant amount of waste that had to be processed and stored.

This paper looks at how Canterbury has coped with its damaged land and the issues that arose as a result; demolition, silt, waste, pests and population shift. What was the law in place to cover these issues? Was it adequate? Is there a need for more proactive planning for safeguards to protect the environment after land damage in a natural disaster rather than the reactive approach that was taken? Now is the time to prepare. For we have been warned it is not *if* another large earthquake should strike, but *when*.



Toni Collins

Dr Toni Collins is a Lecturer at the School of Law at the University of Canterbury in Christchurch, New Zealand. She has an LLB(Hons) and an LLM(Hons). She has recently completed her PhD entitled "The Doctrine of Frustration, Commercial Leases and the Canterbury Earthquakes". She teaches in Land Law and her research interests include disaster law, resource management and environmental law. Toni has been admitted as a Barrister and Solicitor of the High Court of New Zealand and as a Solicitor of the Supreme Court of England and Wales. She has worked in private practice in New Zealand and the United Kingdom practising in commercial litigation, employment law, family law, commercial law and land law. When the Canterbury earthquakes struck she was practising intellectual property law managing an extensive trade mark portfolio for an insurance company. The multitude of legal issues that arose after the earthquakes sparked an interest in the area of disaster law and culminated in her obtaining a scholarship and completing her doctorate.

Thursday 28 September 2017

11.30 – 1.00 pm - Parallel Session 2

Moot Court

Responses to Maintaining Enduring Property Relationships – A Focus on Vulnerable Persons

Chair: Nicole Johnson

A constitutional reconceptualization of servitude law in South African law

Sue- Mari Viljoen, College of Law, The University of South Africa

An unceasing challenge in the South African property regime is the provision of secure occupation rights for the marginalised. The need to address insecure tenure is imbedded in the conception of the constitutional right of access to adequate housing, as guaranteed in section 26(1) of the Constitution of the Republic of South Africa, 1996. Prior to the advent of the Constitution Andre van der Walt already argued that the view of ownership as being absolute and unrestricted infiltrated the theory of land rights and in order to align the law of property with scope for developing suitable land rights to satisfy the needs of the most vulnerable, this perception of ownership must be discredited. Recent developments in state policies, laws and academic literature show that other forms of tenure should be developed to give content to the housing rights of low-to-medium income households, although precious little has been done about the occupation rights of the most vulnerable.

A body of work is required to determine ways in which common law property rights can and should be developed to respond to the insecure land rights of these, and other, households. As a point of departure, the law of servitude and specifically that of *habitatio* should be scrutinised to reflect upon its current use and ways in which it can be transformed to respond to the constitutional mandate of enhanced socio-economic rights, especially to that of housing. An evolution of this entrenched private property right is likely to be expected, specifically in relation to the establishment thereof. Moreover, a transformation of this kind also calls for a radical departure from the way in which servitude law is traditionally conceived – some reconceptualization from the private law sphere towards the public law sphere is essentially required to foster enforceable property rights for the most vulnerable. The Constitution, case law and academic literature provide clear directives on ways in which the common law should be developed to give content to constitutional objectives – the fulfilment of fundamental rights is not solely the duty of the legislature. In fact, the plight of the poor is increasingly being placed at the doorstep of the courts, especially when the legislature fails to adhere to its constitutional demands.

The development of the common law is arguably the one aspect of constitutional transformation that still requires the most work, specifically in the area of property law. Major shifts have taken shape in specifically legislation and the courtroom, which has undoubtedly altered the private property lawyer's understanding of ownership – one can most definitely no longer perceive ownership as inherently unrestricted, but the scope and use of 'private' property rights (such as servitude) is still restricted to a

very specific private law enclave. Servitude law is arguably one of many areas of property law that requires in-depth analysis to determine whether and to what extent this area of law can respond to those desperately in need of security of tenure. An analysis of this kind requires a clear understanding of both private owners' entitlements, including the right to exclude, as well as the 'contemporary political, economic and societal expectation' that we find in entrenched constitutional provisions, like that of section 26(1).

Sue- Mari Viljoen



Prof Sue-Mari Viljoen is a National Research Foundation (NRF) Y1-rated researcher in Law. She is an Associate Professor in the College of Law at Unisa. She has successfully supervised two postgraduate studies.
She joined the Department of Public, Constitutional and International Law in 2012 as a Senior Lecturer. Her teaching areas are mainly Administrative Law.
Prof Viljoen specialises in Property Law and Housing Law. She started her research career as an LLM student in 2008 when she joined the South African Research Chair in Property Law (NRF initiative), then hosted by the University of Stellenbosch Prof A.J. van der Walt as Chair. After completing her LLD in 2010, she continued to work at the Research Chair as a Postdoctoral Fellow in 2011.
She is the author of a number of articles in accredited national and international journals.

Alice through the looking glass – Reimagining title and tenancy rights for a brave new (affordable) world.

Michael Nancarrow (Central Queensland University)

This paper investigates land title and tenancy rights in community housing. The paper begins with an explanation of the landscape of community housing as a tenurial category of social and affordable housing in Australia today. The current legislative arrangements for property rights in community housing are then explained. In this context, the *Community Housing National Law* as enacted through enabling State legislation is considered in relation to the vesting of Torrens title land in registered community housing providers. The paper then undertakes an evaluation of the impact and consequences of the statutory vesting of land title in public housing properties in registered community housing providers based upon public policy and social purpose considerations. New South Wales, Queensland and Western Australia will be considered comparatively in evaluating the consequences of 'vested' title. These jurisdictions are selected as they reflect experiences in both participating and non-participating States under the *Community Housing National Law* as well representing a geographical spread across the footprint of community housing nationally. This part of the paper concludes by juxtaposing the strategy of statutory vesting of Torrens title with the general law's response to voluntary transfers of Torrens title private freehold land.

The paper next considers social housing tenancy rights. The discussion proceeds by distinguishing tenancy legislation which differentiates social housing tenancies from legislation which incorporates these into regular residential tenancy provisions. This section of the paper is also comparative. These 'differentiated' and 'undifferentiated' tenancy agreement strategies will be reviewed in relation to the consequences for tenancy dispute resolution.

The paper concludes with a comment on the implications for property rights of Commonwealth funding reforms introduced in the 2017 Federal Budget.

Michael Nancarrow



Dr Michael Nancarrow received his PhD in Law from the University of NSW in 2010. He has previously also studied at Macquarie University, the University of Sydney and Oxford University. His professional and academic expertise in legal education and in his early law practice experience has been in property law. Michael has written 2 theses in this field, has delivered conference papers and published in this field, including in Halsburys' Laws of Australia. His professional career started in the Commonwealth Department of Prime Minister & Cabinet during the Hawke government. Michael has also worked in private legal practice with the international firm of Baker & McKenzie and subsequently with Ross Tzannes (foundation author of the NSW Strata Titles loose leaf service and property law teacher at the University of Sydney Law School for 10 years) in the firm of Pryor, Tzannes and Wallis in Sydney.Michael has taught at a range of universities and Law Schools in Australia and been a Visiting Fellow at Stanford Law School (USA) and Osgoode Hall Law School (Canada). Since 2013 he became more intensively

involved in online legal education, through teaching into the CQUniversity online LLB program and taking responsibility for the property law courses within the CQU LLB program.

Another area of interest and expertise for Michael is professional and applied ethics. He has worked extensively in this field delivering conference papers and publishing internationally. In July 2012 he delivered a peer reviewed paper at the International Society for Business, Economics and Ethics World Congress in Warsaw. A version of that paper was also delivered to the Centre for International Governance, School of Law, University of Leeds in the United Kingdom.

Striving for Justice: Will Proposals put forward by the Australian Law Reform Commission adequately address issues faced by elderly litigants when disputing a failed assets for care arrangement?

Teresa Somes (Macquarie University)

On 15 June 2017, the Australian Law Reform Commission ('ALRC') released its wide ranging report into Elder Abuse. In general terms, the recommendations propose a coordinated national response to laws and frameworks aimed at safeguarding older Australians from abuse, framed against a backdrop of maintaining the older person's dignity and protecting their human rights. Chapter 6 of the report targeted family agreements, or assets for care arrangements. Recognising that an elderly person faces significant obstacles when bringing an action to recover property, the ALRC recommended State tribunals be given jurisdiction to hear matters and make remedial orders with the aim that proceedings would be quicker and undertaken in a more informal environment.

This paper reviews the ALRC proposal, and argues the recommendations fall short of comprehensively addressing the issues faced by elderly and sometimes vulnerable litigants. It outlines further proposals which provide greater access to justice for older people in failed assets for care arrangements.

The proposed framework addresses two primary obstacles preventing an elderly person achieving resolution of a dispute. First, existing legal principles fail to provide a satisfactory cause of action for the older person when pursuing a remedy. By creating a new statutory cause of action, older people avoid the complicated, time consuming and expensive process of having to prove an equitable cause of action. Secondly, while State tribunals offer a degree of informality compared to the Supreme Court, the particular challenges faced by the elderly in a court environment requires greater attention. Conditions such as poor health, diminished capacity, complex family dynamics, mobility, and limited understanding of or access to technology all potentially impact an older person's ability to commence and continue litigation. Informed by the theory of therapeutic jurisprudence, these proposals focus on providing a framework to address the complex and diverse range of issues known to affect people as they age.



Teresa Somes

Teresa graduated with degrees in Arts and Law from the Australian National University, and is admitted as a barrister and solicitor of the ACT Supreme Court. She is currently undertaking her PhD through the University of South Australia, examining the legal position of the older person in an asset for care arrangement. The thesis highlights the limitations of the present law and puts forward proposals for reform.

Teresa has presented her research at conferences in Australia and New Zealand, and has co-authored several articles with Professor Eileen Webb concerning older people and family accommodation arrangements. Her work has been cited in the recent ALRC report into elder abuse.
Teresa is at present an associate lecturer at Macquarie University where she teaches equity and trusts, and property law.

Strategies to enhance housing security for WA's older renters – Lessons from the Victorian Inquiries

Helen Hodgson, Amity James and Eileen Webb (Curtin Law School)

This paper presents recent research undertaken by the presenters and supported by the Bankwest Curtin Economics centre. More people are reaching retirement age without owning a home and the number of older people residing in the private rental market is increasing. Fixed incomes, short leases, a lack of affordable housing options and limited capacity to modify a rental property see many older renters experiencing tenure insecurity. Drawing on national and international legal, financial, planning and policy precedents, this research developed interdisciplinary strategies to make housing more secure for older people in the private rental sector in metropolitan and regional WA. The research considered recent Victorian inquiries that could have influence in reshaping the WA approach to older renters.



Helen Hodgson

Helen Hodgson is an Associate Professor in the Department of Taxation at Curtin Law School. Helen Hodgson joined Curtin Law School as an Associate Professor in 2014, following ten years teaching in the Atax programme at UNSW.Helen has a particular interest in Tax Policy, and was a participant at the 2010 Tax Forum. Her current area of research is the tax-transfer system, but she also researches in superannuation, and the gender impacts of the tax-transfer system. In 2010 Helen was a co-author of the Women's Voices Report commissioned by the Equality Rights Alliance to examine factors influencing women's work-force participation, including superannuation, tax and transfer issues.

Helen holds qualifications in accounting, business law and taxation, is a Fellow of the Australian Society of CPA's and a Chartered Tax Advisor.



Amity James

Amity James is a lecturer and researcher in the Curtin Business School. She is leading a major national AHURI grant and is involved in other funded research including from AHURI and BCEC. Amity has co-authored two books:

Rowley, S., A. James, C. Gilbert, N. Gurran, R. Ong, P. Phibbs, D. Rosen, and C. Whitehead. 2016. "*Subsidised affordable rental housing: lessons from Australia and overseas.*" Melbourne, Australia: Australian Housing and Urban Research Institute Limited.

Davies, A., and A. James. 2011. *"Geographies of Ageing: Social Processes and the Spatial Unevenness of Population Ageing."* United Kingdom: Ashgate Publishing Limited.

Thursday 28 September 2017

2.00-3.30 pm - Parallel Session 1

Room 2.08

Property and Contract

Chair: Robyn Honey

Clash of Titans: Torrens Land Title and Contractual Interpretation

Dr Ben France-Hudson, Faculty of Law, University of Otago, Dunedin, New Zealand

As we move beyond sole ownership, we are likely to see an increase in the use of tools such as easements and covenants which grant third parties interests in land. These instruments are likely to become more complex, with corresponding difficulties in determining their meaning and operation. This challenge will be compounded by current conflicts regarding the correct approach to the interpretation of registered documents.

While easements and covenants start off as private contracts, they are ultimately recognised as conferring proprietary interests in the land and, at least in Australia and New Zealand, generally become subject to the Torrens system of registration. The appropriate approach to the interpretation of the contract underpinning such interests has become a fraught issue as the modern approach to contractual interpretation has developed and expanded the types of extrinsic evidence that can be

considered in the search for the true meaning of a contract. In so doing, the potential for a conflict has arisen between contractual interpretation principles and Torrens principles.

Two recent New Zealand cases illustrate the contemporary importance of this issue. In *Escrow Holdings Forty-One Ltd v District Court at Auckland* [2016] NZSC 167, [2017] 1 NZLR 374 the Supreme Court interpreted a registered covenant as creating a positive right for a third party to access the land. In so doing, the Court noted the difficult issues that arise when interpreting documents on a public register, although it proffered no opinion on how to resolve them.

In this paper, I aim to assess the competing arguments raised by such cases. I will suggest that, at least in New Zealand, the fact that registration is grounded in a detailed statute that radically alters the traditional common law and equitable rules, is often overlooked. The effect of such legislation on any interpretive exercise must be considered. It will be suggested that an appropriate starting point for resolving some of the tensions in this area is to remember the purposes and principles of the Torrens system.



Ben France Hudson

Ben researches the law and theory of private property, with a particular focus on natural resources and land law. His current teaching includes Property Law and the law of Vendor and Purchaser.

Ben is responsible for several chapters in the leading New Zealand textbook *Brookers Land Law* (J Burrows (ed) looseleaf ed, Thompson Reuters, 2016) and a member of the editorial board for the journal *Resource Management Theory and Practice*. In 2015 (along with co-researchers from the Universities of Canterbury and Otago) Ben was awarded funding by BRANZ (the Building Regulation Authority of New Zealand) and the New Zealand Law Foundation, to conduct research to consider revising the legal frameworks for the ownership and use of multi-dwelling units on a single piece of land.
Ben has worked as a Judges' Clerk at the Christchurch High Court, as a solicitor in the Treasury Solicitor's Office (London), as an Assistant Crown Counsel in the Crown Law Office (Wellington).

The True Test for Specific Performance for a contract for the transfer of land in Australia – Did the High Court in Pianta establish an inviolable rule?

Ken Yin (ECU)

The suggestion has frequently been made in academic literature that there is a predisposition in Australia in favour of specific performance of a contract for the transfer of land, which some authors suggest is an absolute a rule. The authors of these views posit that because damages are not regarded as an adequate substitute for the transfer of land, which is regarded as unique, specific performance would invariably be decreed. *Pianta v National Finance & Trustees Ltd*[6] is often cited as the genesis of the proposition.

We suggest, to the contrary, that such a rule did not in fact ever exist and that the High Court in *Pianta* never did intend to lay down such a rule. In exploring this proposition, we analyse carefully the exact language used by Barwick CJ in *Pianta,* focusing on His Honour's own subsequent judgement in *Loan Investment Corporation of Australasia v Bonner (Loan Investment).*[7]

The outcome of this enquiry is that the predisposition in favour of specific performance of contracts for the transfer of land was based upon the historical assumption that land was unique. With the advent of the recognition that land these days is frequently regarded as a mere article of commerce rather than as unique, the strength of this predisposition likewise has diminished. Consistent in particular with Barwick CJ's own treatment in *Loan Investment,* we suggest it is not however the uniqueness of land as such which determines the purchaser's entitlement to specific performance; rather, that the enquiry should be as to whether specific performance should be granted because damages would not be adequate compensation for the transfer of the land. Such an enquiry, correctly performed, would simply reflect an application of first principles.

[6](1964) 180 CLR 146.
[7] [1970] NZLR 724.



Ken Yin

Ken is a retired barrister and now lectures at the School of Business and Law, Edith Cowan University. He is a relatively recent newcomer to full-time academia, having previously practised at Francis Burt Chambers before retiring totally in June 2013.

He practised extensively in contract law and has published regularly in the area. He contributed the following articles to the Australian Bar Review: *Recent developments in the phenomenon of agreement, and the practical effect of these on the scope of estoppel-based relief in Australia* (2014) 38 Aust Bar Rev 299; *Specific performance in favour of a purchaser under a contract for the transfer of land* – An analysis of the present Australian position (2015) 41 Aust Bar Review 79; and *When is termination of a breached contract a prerequisite for the recovery of damages?* (2016) 41 Aust Bar Rev 179.

Additionally, Ken is passionately interested in legal education and writes He is the primary author of the recently published LexisNexis text: K Yin & A Desierto, A (2016), *Legal problem solving and syllogistic analysis: a guide for foundation law students*, LexisNexis Butterworths, Chatswood, New South Wales and contributes regularly to academic discussion on the topic. These include four legal education conference papers at the recently concluded ALTA conference in July.

Outside academia, he was a member of the Australian Army Reserve, retiring at the rank of Major. His present hobbies are singing and following the misfortunes of Tottenham Hotspur in the English Premier League.

Statutory unconscionability and unfair conduct in retail tenancy leases: Panacea or placebo?

Sitesh Bhojani and Eileen Webb, Curtin Law School

This paper analyses the trajectory of decisions involving s21 *Australian Consumer Law* and retail leasing transactions. The paper also considers the recent extension of the unfair contract terms provisions in the ACL to retail leases. At issue is whether the legislation provides access to justice for aggrieved tenants or is merely an elaborate hoax.



Sitesh Bhojani

Sitesh practises in the areas of competition and consumer law, also generally in commercial or contract law, franchising, Judicial Review/ Administrative Law and Merits Review. Between 1995 and 2003, Sitesh was a Commissioner of the Australian Competition and Consumer Commission. Sitesh is a member and past deputy chairman of the Competition and Consumer Committee of the Law Council of Australia. Sitesh is an author (with Eileen Webb) of Statutory Unconscionability in Australia (Federation Press, 2018)



Eileen Webb

Eileen joined the Curtin law School is 2016. She is the Director of the Consumer Law and Small Business Law Discipline and has introduced the elder law program. She teaches and researches in real property law, particularly housing and tenancy law, competition and consumer law (including small business law) and elder law. Eileen is an author (with Sitesh Bhojani) of Statutory Unconscionability in Australia (Federation Press, 2018). In August 2017 Eileen was appointed to the Law Reform Commission of Western Australia.

You'll be looked after at renewal - Commercial leasing and uncertainty about the requirement for certainty of representation

Allison Silink (Faculty of Law, University of Technology, Sydney)



Allison Silink

Allison Silink is a barrister and lecturer in law at UTS. She coordinates and teaches the undergraduate course in Equity & Trusts and teaches in Advanced Trusts.

Thursday 28 September 2017

2.00-3.30 pm - Parallel Session 2

Moot Court

New perspectives on existing property law principles

Chair: Rupert Johnson

An access-based paradigm of property: from the Italian theory of the commons to the progressive property manifesto

Allessandra Quarta University of Turin (Skype)

In the last ten years, the category of commons has known a significant legal development in Italy.

In 2007, a Commission in charge by the Minister of Justice of proposing a reform of the civil code's part dedicated to public goods introduced an important legal definition of commons. According to the Commission, commons are those goods which produce utilities that are able to fulfil fundamental rights; this definition included a not closed list of commons, composed by natural resources as parks, forests and water as well as the artistic and cultural patrimony. Furthermore, the Commission considered commons not only particular public goods but also private goods: in its legal program, the ownership of commons is not the main point, while their governance and the effective possibility to have access represent the core of the discipline.

After 2007, commons have been discussed in many legal fields as well as in political contexts: they became the symbol of another way to own and manage resources even in the interest of future generations. Commons allow a new critique to the relationship between public sphere and private sector in a period in which Italian governments used to privatize assets and services to improve the economic situation of the country.

In private law theory, commons became a key concept through which opening a new debate about the legitimacy of private property, considering in particular the role of the right to exclude. In fact, commons are based on the idea of access, a new prerogative for imaging an inclusive paradigm of property.

In this framework, access can be described according to different principles that allow interpreting in a counter-hegemonic way traditional private law: in other words, it can assume new meanings by taking into account the social and economic situation. The main point is the description of an access-based paradigm of property, with the objective of using property as a tool for redistribution, without using expropriation.

This debate presents any similarity with the progressive property position as described in 2009 in the Manifesto signed by Gregory Alexander, Eduardo Peñalver, Joseph Singer, Laura Underkluffler. My idea is to put in relationship the access-based paradigm of property with progressive scholars' solution, taking into account two main perspectives.

Primarily, the differences among legal traditions, considering those cultural and legal processes that have consolidated an exclusive idea of property in civil law and common law. The bundle of rights description could facilitate the introduction of a new balancing test between exclusion and inclusion but, at the same time, it is not useful for considering the position of non-owners. In fact, the bundle describes relations and oppositions between owners, according to a legal fiction that in the civil law tradition legitimates the link between private property and freedom.

Secondly, the role of constitution. The progressive property approach is probably too much confident with the possibility to establish constitutional warranties about a social function of property. In civil law tradition, many countries as Allemande, Spain and Italy have this special constitutional clause but it has not been useful for avoiding exclusive processes against nonowners.

In this legal framework, the conflict between exclusion and inclusion in both the two system can offer important suggestions for identifying some interpretative criteria by which introducing an access-based paradigm of property. This paradigm shift in private law is able to enhance the commons approach in order to consider private property in accordance with social and economic instances of redistribution.

Allessandra Quarta

Dr. Alessandra Quarta is a Research Fellow at the University of Turin, Department of Law

The Philosophical Foundations of Personal Property Law

Gerard McMeel Faculty of Law, The University of Manchester

This paper explores the traditional jurisprudential interest in the philosophical foundations of property law, from a *personal* property law perspective, and its recent increased prominence in the literature. The author has previously explored agency using the same approach, noting its prominence in mid-twentieth century works of analytical jurisprudence. More recently, he co-authored a new treatise on personal property law

Intriguingly there is a long tradition of bemoaning both the limited quantity and variable quality of legal writing on personal property. Sir William Blackstone was the first to complain[8] Despite that, in many fields of personal property law, Sir William Blackstone's *Commentaries* are the starting point for discussion. The late Professor Peter Birks lamented: "With the exception of a few specialisms, our law of personal property is in a bad state." The weighty influence of Roman law on some topics is acknowledged, although the domestic law has sometimes followed the Roman path, and sometimes developed along its own lines. For example, there has been significant reference to Roman Law in three appellate cases concerning personal property law: *Foskett v McKeown*, *OBG Ltd v Allan* and *Yearworth v North Bristol NHS Trust*.

Gerard McMeel

Gerard McMeel is Professor of Commercial Law at the University of Manchester, UK, and a Barrister, England and Wales. He is a co-author of The Law of Personal Property (2013; 2nd edn., 2017)

The Personal Property Securities Act – Is a Security Agreement Really Effective according to its Terms?

Linda Widdup (Curtin Law School)

The *Personal Property Securities Act 2009* (Cth) (**PPSA**) came into force in Australia five years ago bringing substantial changes to the general law of personal property securities and commercial law. The legislation takes a functional approach to personal property securities and eliminates the distinctions between previous forms such as chattel mortgages, charges and retention of title arrangements. The PPSA is not a complete code on personal property securities, but is supported by the general law to the extent the general law is not directly inconsistent with the provisions of the PPSA. To reflect the fact that the PPSA is not a complete code, s 18(1) states that a security agreement is effective according to its terms. A security agreement is any agreement that creates a security interest in personal property. Section 18(1) intends to clarify that the general law of contract continues to support the legislation. A body of case law has now developed in Australia interpreting how the provisions in the PPSA interact with the general law. This paper will examine this case law with respect to how the PPSA's functional approach overrules the general law of contract.

8 Sir William Blackstone (Blackstone, W., *Commentaries on the Laws of England*, 1st edn (1765–1769), II 386:.

Linda Widdup



Linda Widdup is the unit coordinator for the core units in the LLB program of Property Law Principles and Principles of Equity. She is also the unit coordinator for the unit Contemporary Legal Issues for the Honours Program. Linda is also a sole practitioner and practices law as a consultant in the commercial law area. Linda is admitted as a barrister and solicitor of the Supreme Court of Western Australia, the High Court of New Zealand and the Law Society of Saskatchewan, Canada and has spent several years in private practice in all three jurisdictions. Her practice focused on commercial law and, in particular, commercial lending, restructuring and insolvency and commercial contract work for significant clients in the financial services, mining and agribusiness sectors.

Linda is a member of the Law Society of Western Australia, and serves on the Law Society's Commercial Law Committee.

Embedded Property

Doug Harris (University of British Columbia) (Skype)

Condominium or strata property embeds private property in a community of owners. In the case of multi-unit or multi-title buildings, each individual privately-held unit is physically embedded in a collection of other privately-held units. But even in multi-title developments where there are no shared walls or common infrastructure providing physical support for individual units, condominium embeds the owners of these units in a set of legal relationships defined in property. In addition to separately titled individual units, the owners within condominium also hold undivided shares of the common property, a right to participate in the governance of the private and common property, and an obligation to contribute to the maintenance of the common property. This is the package of rights and responsibilities in condominium property, a form of ownership that constructs private property within a community of owners.

Borrowing Karl Polanyi's metaphor of embeddedness, and drawing on Canadian condominium law, particularly as it has developed in the province of British Columbia, this paper argues, first, that understanding the manner in which private property is embedded within a community of owners is crucial to understanding condominium ownership. Second, the paper argues that legislatures and courts are responding to the embeddedness of property within condominium by changing what it means to be an owner of an interest in land. These changes, which enhance the interests of some, but diminish the interests of others, are also a function of the massive increase in the density of owners that condominium facilitates. Owners were once spread over the surface of the earth in a single layer, but they are now stacked in a vertical column many stories high. This spatial reorganization of owners is instigating important changes in what it means to be an owner of land. Finally, the paper suggests that condominium property, which is rapidly displacing other forms of land ownership in cities around the world, is becoming the paradigm of ownership. What it means to be an owner of land, whether inside or outside condominium, will be determined increasingly by what ownership within condominium comes to mean.

In the conclusion, this paper asks whether it is a problem that, by embedding private property in a community of owners which governs and maintains the property, condominium disembeds property and people from conceptions of community that are defined by something other than ownership.

Douglas Harris

Douglas Harris joined the Allard School of Law in 2001. He teaches in the areas of property law and legal history, and his research focuses on the history of the regulation of the Aboriginal fisheries in British Columbia and on the nature of property ownership within condominium. His earlier published work includes studies of Aboriginal rights to fish in Canada and analysis of systems for registering interests in land. Whether in the classroom or in print, Harris's work is animated by a desire to understand and explain some of the salient legal issues in the city, province, and country that he calls home. Recent public lectures include "Condominium & the Country: The Sprawl of Property in British Columbia" and "Property & Sovereignty: The Kitsilano Indian Reserve and the City of Vancouver".

After completing his B.A. (UBC History) and LL.B. (Toronto), Harris articled in Vancouver and was called to the British Columbia bar in 1994. He returned to school to complete LL.M. (UBC) and PhD (Osgoode Hall, York University) degrees in legal history. During his years as a university student, Harris was a member of Canada's field hockey team that competed at the Olympic Games in Seoul (1988), the Pan American Games (1987, 1991, 1995), and the World Student Games (1991). Harris served as Associate Dean Graduate Studies & Research in the Law School, 2008-2013, and he is currently Chair of the UBC Press Publications Board. In 2016, he received the law school's Faculty Scholar Award.

Moving to the electronic lodgement of instruments: marking the death quell of indefeasibility of title and the return of the paper-based chain of title in relation to forged mortgages?

Penny Carruthers and Natalie Skead (UWA)



Penny Carruthers

Penny Carruthers is a Lecturer and Deputy Head of Law School, Learning and Teaching. Penny's research interests lie in the areas of Property, Land Law, Equity, Trusts and Legal Education.



Natalie Skead

Natalie Skead is the Associate Dean (Learning and Teaching) and an Associate Professor of Law at the University of Western Australia. Natalie's principal teaching areas are Property, Land Law and Equity and Trusts. She has been the recipient of several Faculty, University and national awards for teaching excellence.

Thursday 28 September 2017

4.00-5.30 - Parallel Session 1

Room 2.08

Emerging Issues in Property Law 1 – The Blockchain

Chair: Pip Ryan (University of Technology, Sydney)

The Blockchain versus Property Law

Pip Ryan (University of Technology, Sydney)



Pip Ryan

Dr Pip Ryan is a barrister and lecturer in the Faculty of Law at the University of Technology. She coordinates and teaches Commercial Equity and Disruptive Technologies and the Law. Pip also facilitates an extracurricular programme that teaches law students how to design and develop legal apps for NGOs. She is a member of the Standards Australia Blockchain Technical Committee and she Chairs the Smart Contracts Working Group. She is also a member of the International Standards Organisation's Smart Contracts Study Group. Pip's PhD formulated a new classification for the liability of third parties to breach of trust. Her current research explores business relationships, custodial obligations and breach of fiduciary duty in apparently trustless commercial arrangements enabled by Blockchain technology.

Blockchain Immutability: Lessons from Torrens Indefeasibility

Alvin W-L See School of Law, Singapore Management University

The blockchain technology, which was initially used in the development of cryptocurrencies (e.g. Bitcoin), shows prospect for wider application, for example in ledgers and registration systems for banks, land and shares. The blockchain is a distributed rather than a centralised ledger: it is not kept in a centralised server but is instead replicated across all computers (called nodes) running the same software. Blocks containing information of transactions are added to the chain upon validation by a majority of computers in the network in accordance with pre-agreed rules, written into code. These features make it extremely difficult for any individual to modify records on the blockchain, at least not by directly attacking the ledger as there is no centralised server and thus no single point of failure. There is also no simple means of reversing any transaction, should it be affected by

fraud or mistake. This latter attribute, called immutability by advocates of the blockchain, is regarded as superior to traditional bank ledger systems. Whilst it is still unclear what immutability means, and it means different things to different segments of the blockchain community, it is necessary to address the question of whether immutability is a strength, a flaw or a double-edged sword. There are two distinct reasons to question the perception among the blockchain community that it is an unqualified advantage. First, to instill confidence in a broader community of users, the system must be capable of dealing with vitiated transactions, e.g. due to theft, fraud or mistake. Second, unless a highly complex blockchain is set up, more complex transactions, for example holding of the asset on trust or offering the asset as a security, are viable only if immutability is subject to interests that are not reflected in the blockchain (e.g. beneficial interests and equity of redemption). In approaching these issues, valuable lessons could be derived from the conception and evolution of the Torrens system of land titles registration, particularly on the topic of indefeasibility. At least four areas of development are worthy of mention. First, the choice between immediate and deferred indefeasibility has implication on whether a transferee who is a mere donee (as opposed to a purchaser) acquires indefeasible title. Second, the scope of the fraud exception, although included in the original statute, remains debatable owing to the malleable definition of fraud. Third, the list of indefeasibility exceptions has been subsequently extended both by statute and by the judicial recognition of personal equities. Underlying the incremental extension is the debate about the meaning of indefeasibility and what counts as a true exception. Fourth, despite its emphasis on registration of transactions, it has been recognised that the Torrens system does not preclude the existence of unregistered interests, which are to be protected mainly by the system of caveats. These developments illustrate the point that the principle of indefeasibility, and similarly in the case of blockchain immutability, is by no means a straightforward matter and that any viable system must provide a framework for mediating disputes, particularly between innocent parties, and to cater for the possibility of complex commercial transactions.

The session will also include a demonstration of the new PEXA electronic conveyancing software.



Alvin W-L See

Alvin is an Assistant Professor of Law, Singapore Management University. His co-author, **Kelvin FK Low** is an Associate Professor of Law, Singapore Management University.

Thursday 28 September 2017

4.00-5.30 - Parallel Session 2

Moot Court

Emerging issues in Property Law 2 – Teaching Property Law in 2017 and beyond

Chair: Michael Nancarrow (Central Queensland University)

Panel: Cathy Sherry (UNSW) and Ken Yin (ECU)

This (Panel) session will be chaired by Dr Michael Nancarrow (Central Queensland University). The session will discuss:

- Engaging 'Millennials' and mature age students with 21st C property law perspectives;
- Addressing the technological transformation of property Law and practice through professional credentialing of property lawyers for a brave new world;
- Strategies for how property law educators can equip students with skills for the changing landscape of property law practice: Assessment and learning tools which connect principles with practice and develop real world skills for modern property lawyering.

The session will also include a demonstration of the new PEXA electronic conveyancing software.



Michael Nancarrow

Dr Michael Nancarrow received his PhD in Law from the University of NSW in 2010. He has previously also studied at Macquarie University, the University of Sydney and Oxford University. His professional and academic expertise in legal education and in his early law practice experience has been in property law. Michael has written 2 theses in this field, has delivered conference papers and published in this field, including in Halsburys' Laws of Australia. His professional career started in the Commonwealth Department of Prime Minister & Cabinet during the Hawke government. Michael has also worked in private legal practice with the international firm of Baker & McKenzie and subsequently with Ross Tzannes (foundation author of the NSW Strata Titles loose leaf service and property law teacher at the University of Sydney Law School for 10 years) in the firm of Pryor, Tzannes and Wallis in Sydney.Michael has taught at a range of universities and Law Schools in Australia and been a Visiting Fellow at Stanford Law School (USA) and Osgoode Hall Law School (Canada). Since 2013 he became more intensively involved in online legal education, through teaching into the CQUniversity online LLB program and taking responsibility for the property law courses within the CQU LLB program.

Another area of interest and expertise for Michael is professional and applied ethics. He has worked extensively in this field delivering conference papers and publishing internationally. In July 2012 he delivered a peer reviewed paper at the International Society for Business, Economics and Ethics World Congress in Warsaw. A version of that paper was also delivered to the Centre for International Governance, School of Law, University of Leeds in the United Kingdom.



Cathy Sherry

Cathy Sherry is a leading Australian expert on strata and community title. She provides advice to government and the private sector on the complexities of collectively-owned property. Cathy's research focuses on the social implications of private communities, as well as optimal planning for children. Cathy has a special interest in urban farming and the challenges of providing growing space in high density cities.
Cathy is an academic member of the Australian College of Community Association Lawyers (ACCAL) and her postgraduate course*, Strata and Community Title Law*, LAWS8115, is the approved accreditation for membership of ACCAL. Cathy is a General Editor of the international property journal, Property Law Review. She is the author of Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties*, Routledge, London, 2017.



Ken Yin

Ken is a retired barrister and now lectures at the School of Business and Law, Edith Cowan University. He is a relatively recent newcomer to full-time academia, having previously practised at Francis Burt Chambers before retiring totally in June 2013.

He practised extensively in contract law and has published regularly in the area. He contributed the following articles to the Australian Bar Review: *Recent developments in the phenomenon of agreement, and the practical effect of these on the scope of estoppel-based relief in Australia* (2014) 38 Aust Bar Rev 299; *Specific performance in favour of a purchaser under a contract for the transfer of land* – An analysis of the present Australian position (2015) 41 Aust Bar Review 79; and *When is termination of a breached contract a prerequisite for the recovery of damages?* (2016) 41 Aust Bar Rev 179.

Additionally, Ken is passionately interested in legal education and writes He is the primary author of the recently published LexisNexis text: K Yin & A Desierto, A (2016), *Legal problem solving and syllogistic analysis: a guide for foundation law students*, LexisNexis Butterworths, Chatswood, New South Wales and contributes regularly to academic discussion on the topic. These include four legal education conference papers at the recently concluded ALTA conference in July.

Outside academia, he was a member of the Australian Army Reserve, retiring at the rank of Major. His present hobbies are singing and following the misfortunes of Tottenham Hotspur in the English Premier League.