

CRITIQUE AND COMMENT

**PUSHING THE ENVELOPE OF
PROPRIETARY INTERESTS: THE NADIR OF
THE *NUMERUS CLAUSUS* PRINCIPLE?**

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The numerus clausus principle is an inherent approach to the structure of property interests which is reflected in both the common and civil law and in both real and personal property. There are sound policy reasons for this approach based on economic and legal concepts. This conservative influence on property interests is increasingly being disrupted by the impact of judicial activism but more importantly by statutory property interests based upon social and environmental forces which seek to loosen the bonds of this principle. The advantages and criticisms of this principle are analysed in this article along with the potential risks of disrupting this fundamental meta-principle of property law.

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I INTRODUCTION

Property law may seem for some to be like the never changing law of the Medes and Persians,¹ but the concept of what property is, how we describe it, and what types of instruments may be appropriately created as property interests, continues to develop.² The stability in property law reflects to some extent the influence of the *numerus clausus* principle, or ‘closed list rule’, that has jealously guarded entry by new interests to the status of property interests unless they complied with specified criteria. Edgeworth describes this ‘metaprinciple’ as follows:

Conventionally described as ‘the *numerus clausus* principle’ — in English, the ‘closed list’ principle — it expresses the stringency of the common law’s approach to property rights, particularly over land. In essence, the principle holds that landowners are not at liberty to customise land rights, in the sense of reworking them in an entirely novel way to suit their particular individual needs and circumstances. Rather, any new rights must fit within firmly established pigeonholes, of which the law permits only a small and finite number. The principle applies regardless of the terms of any agreement that parties might reach for the purpose of creating such an interest, so it is irrelevant that a specific contractual arrangement to create a wholly novel interest might be free and fair.³

Despite the conservative influence provided by this principle, this article argues that the complexity of our increasingly globalised world, global issues like climate change and technological advances will promote significant change in property law concepts.⁴ The ability of property law to develop and change is significant as it ‘constitutes one of the tools humans use to shape our

¹ ‘Now, O king, ... sign the writing, that it be not changed, according to the law of the Medes and Persians, which altereth not’: *Book of Daniel* (King James Version, 2004 ed) 6:8.

² Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (Intersentia, 2008) 1–2.

³ Brendan Edgeworth, ‘The *Numerus Clausus* Principle in Contemporary Australian Property Law’ (2006) 32 *Monash University Law Review* 387, 387 (citations omitted).

⁴ See Anna Di Robilant, ‘Property and Democratic Deliberation: The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law’ (2014) 62 *American Journal of Comparative Law* 367, 368–9.

landscapes' which in turn leads to new forms of property law.⁵ Some changes may be influenced by the political and democratic process behind statutory change along with the traditional developments in the common law based upon the influence of social change. This article will deal with some of the changes in the conception of the nature of property law in recent years, it will analyse some of the influences at the basis of those developments and what might be the future direction for developments in property law. As the envelope of proprietary interests is pushed it may deliver new dimensions about what property means and its significance for an owner of a property interest.

II THE NATURE OF AND JUSTIFICATION FOR *NUMERUS CLAUSUS*

The *numerus clausus* principle is a fundamental concept, reflected almost universally in both common and civil law jurisdictions, with its origins in Roman law and in feudal and post-feudal times.⁶ It has been described from a realist perspective as a principle

which limits property to some set of identifiable and standardized forms, is understood as a means for facilitating stable, and thus necessarily a limited number of, categories of human interaction. The *numerus clausus* principle, in other words, sustains the institutions of property as intermediary social constructs though which law interacts with — reflects and shapes — our social values.⁷

Merrill and Smith justify the *numerus clausus* principle on the basis it reduces the economic costs of determining the attributes of property rights.⁸ It is rarely expressly described in common law case law, and until recent years has attracted limited comment.⁹ Nevertheless, it has influenced both the civil law

⁵ Paul Babie, 'How Property Law Shapes Our Landscapes' (2012) 38 *Monash University Law Review* 1, 5.

⁶ Akkermans, above n 2, 20–1, 43–4; Nestor M Davidson, 'Standardization and Pluralism in Property Law' (2008) 61 *Vanderbilt Law Review* 1597, 1600. But see Glen O Robinson, 'Personal Property Servitudes' (2004) 71 *University of Chicago Law Review* 1449, 1482.

⁷ Hanoch Dagan, 'The Craft of Property' (2003) 19 *California Law Review* 1517, 1565.

⁸ Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1, 26–34, cited in *ibid*.

⁹ *Ibid* 4–6, 9; Davidson, above n 6, 1599.

and the common law approach to determining which interests should or should not be considered property interests and has been described as ‘a norm of judicial self-governance’.¹⁰ A legal system that has an open system of property interests applies a system of ‘*numerus apertus*’ but even in those legal systems there are normally limitations applied for the establishment of novel property rights.¹¹ An example of the application of this principle is the requirement normally applied at common law for easements to exhibit the four essential characteristics outlined in *Re Ellenborough Park*.¹² These requirements have been impacted by statutory provisions discussed below, providing examples of the role of statute in disrupting the *numerus clausus* principle.

The accepted common law property interests include easements, *profits à prendre*, mortgages, leases, restrictive covenants, fee simple absolute, defeasible fee simple, life estate and common interests such as joint tenancy and tenancy in common.¹³ Civil law recognises a limited list of proprietary interests such as ownership, *emphyteusis* (long lease),¹⁴ the right of use and the right of habitation.¹⁵ The *numerus clausus* principle also influences personal property interests in an even more limited manner.¹⁶

Although there is a significant connection between contract law and property law the *numerus clausus* principle provides a contrast from the virtually unconstrained freedom to determine the terms of a contract.¹⁷ The *numerus*

¹⁰ Merrill and Smith, above n 8, 11; Davidson, above n 6, 1600.

¹¹ See Akkermans, above n 2, 7 n 37, where the author suggests examples are South African and Spanish law.

¹² [1956] 1 Ch 131, 163 (Evershed MR), citing G C Cheshire, *The Modern Law of Real Property* (Butterworth, 1954) 456–9:

(1) there must be a dominant and a servient tenement: (2) an easement must ‘accommodate’ the dominant tenement: (3) dominant and servient owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.

¹³ Davidson, above n 6, 1606–10, where the current and developing recognised property interests are discussed, focused on the United States; Di Robilant, above n 4, 368.

¹⁴ Akkermans, above n 2, 280, defines *emphyteusis* as ‘a property right that entitles one to hold and use an immovable object that is owned by someone else’.

¹⁵ *Ibid* 279; Di Robilant, above n 4, 368.

¹⁶ Davidson, above n 6, 1606 n 30, citing Merrill and Smith, above n 8, 17–18.

¹⁷ *Ibid* 1598; Akkermans, above n 2, 2–4.

clausus principle has been described as a ‘fixed universe of property rights’¹⁸ applied implicitly by judges to limit granting proprietary interest status to interests that do not conform to the pigeonhole or criteria which the common law has provided for specified property interests.¹⁹ This principle is not totally inflexible and, as recent developments in both the common and civil law suggest, it should be seen more ‘as a flexible constraint that allows for significant experimentalism in property law’.²⁰ The existence of a *numerus clausus* principle in many jurisdictions suggests that there is an underlying reason for its existence.²¹

III PURPOSE AND JUSTIFICATION FOR *NUMERUS CLAUSUS*

The purpose and justification for the *numerus clausus* principle has been analysed from many perspectives. Broadly, Davidson sees the *numerus clausus* principle as ‘regulating the variety of allowable forms [which] provides platforms onto which property law’s competing social and political goals can be engrafted onto private ordering’.²² O’Connor considers it an attempt to ensure that an acknowledged property right is well defined so that multiple rights in the same asset can coexist and to assist dispute resolution.²³ In this way the pieces of the jigsaw of property interests held over a parcel of land may better fit together without undue dispute or disruption between the owners of each individual piece of that jigsaw. Edgeworth suggests the original policy reasons for the application of this doctrine were:

- avoiding a shackling of the use of land by a myriad of contractually based agreements which might otherwise bind subsequent owners of land;
- to stop an expansion of enforceable property interests that might make conveyancing complex and hazardous; and

¹⁸ Merrill and Smith, above n 8, 69.

¹⁹ The German civil law term for the criteria of each property interest is *Typenfixierung*. Akkermans, above n 2, 394.

²⁰ Di Robilant, above n 4, 370. See also Davidson, above n 6, 1610.

²¹ Davidson, above n 6, 1600.

²² *Ibid* 1601.

²³ Pamela O’Connor, ‘Contractual Specifications of New Property Rights in Resources: The Problem of Measurement Costs’ (2012) 39 *Monash University Law Review* 38, 40.

- to support the ‘science of the law’ by allowing the specified categories to be understood and applied with a considered understanding. This may not be possible if there were a large number of differing and enforceable interests potentially binding on subsequent owners.²⁴

Other theorists have suggested it is based upon economic or structural efficiency or a reflection of social relations such as democratic ideals.²⁵ Based upon the pervasiveness of property — its importance economically, legally and socially — there is an attraction to a pluralist perspective on the value and policy basis for the *numerus clausus* principle.²⁶ The pluralist perspective ‘represents the resolution of the competition between the multiple and often clashing ends that property serves.’²⁷ The ability of property interests to impact not only upon the original creators of the property interest in personam but also on a third party in rem may provide a justification for the application of the *numerus clausus* principle. In a sense, the holder of the property interest must pay the price for that extended advantage by complying with the terms of this principle.²⁸ Whichever policy basis is accepted, the principle has impacted on novel in rem property interests based upon a specific public focus with private and social consequences.²⁹ Property law has always been impacted by public interest concerns expressed through the development of the common law or through legislative expression to deal with social or democratic demands. Property cannot exist without the state protecting and acknowledging property rights³⁰ and this aspect of property is increasingly being affected by statutory forms of property which will continue to erode the limits of the *numerus clausus* principle.

An example of the implicit rather than the explicit application of the principle is the refusal of the majority of the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* to recognise a property

²⁴ Edgeworth, above n 3, 394–5; See also Davidson, above n 6, 1624–5.

²⁵ Davidson, above n 6, 1624.

²⁶ Ibid 1637.

²⁷ Ibid 1601.

²⁸ Akkermans, above n 2, 2–3.

²⁹ Davidson, above n 6, 1602.

³⁰ Bruce Welling, *Property in Things in the Common Law System* (Scribblers Publishing, 1996) 6–7.

interest in viewing a spectacle at a racecourse.³¹ Dixon J, when considering the concept of 'quasi-property' which was raised in this case, noted:

Courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization.³²

This quote suggests a conservative view about the extension of property interests. The reference to the intellectual property interests which then and now rely primarily upon statutory intervention suggests Dixon J looked to statute rather than the courts to take any major steps in developing new property interests.

The desire to avoid the propagation of unwieldy numbers of property interests as a reason to apply the *numerus clausus* principle is well founded, though the modern use of a registration system which has inherent integrity may reduce the value of the *numerus clausus* principle. Edgeworth comments:

Given the absence of registers at the time of the crystallisation of the *numerus clausus* metaprinciple, it is not unreasonable to speculate that the rule as formulated in those cases may never have been introduced, or at least it may not have appeared in its present form, if an effective system of registration were already in place. The minimisation of property forms was the second-best way to resolve the third-party problem. Now that we have the best alternative in place, and in a form (that is, the Torrens system) more efficient than any proposed, or introduced, in 19th Century England, the major reason for retaining the *numerus clausus* in its present, restrictive form is significantly weakened.³³

In this way Edgeworth relies upon one significant policy justification for the application of *numerus clausus* based upon the principle of 'transparency' or 'publicity'. This suggests in rem property interests that may be enforceable

³¹ (1937) 58 CLR 479, 509 (Dixon J). Cf at 512–22 (Evatt J) (dissenting).

³² Ibid 509.

³³ Edgeworth, above n 3, 407. See also Merrill and Smith, above n 8, 40–2.

against third parties require proper notice to third parties who may be bound by that interest.³⁴ If the use of a comprehensive, efficient and effective register of interests effectively provides that required notice, one reason for a strict application of the principle is less relevant.³⁵ This theme is picked up in Hansmann and Kraakman's thesis that the need for standardisation of property interests is only to facilitate proper notification of individual property rights of a given asset to multiple people.³⁶

IV COMMON LAW DEVELOPMENTS RELEVANT TO *NUMERUS CLAUSUS*

Despite this entrenched conservative approach the common law has not been blind to the capacity to approve novel property interests in appropriate cases. One major exception to the *numerus clausus* principle arose in the ground-breaking decision of *Tulk v Moxhay*,³⁷ where in the Court of Chancery for the first time covenants were deemed to be enforceable by a court of equity representing one significant contribution by equity to an extension against the *numerus clausus* principle.³⁸ This authority is significant not only for the result but for the background reasons for the decision that provide some clarity about the factors a court might take into account when considering whether to push the envelope of proprietary interests in the future.

In *Tulk v Moxhay*, Tulk owned a vacant piece of ground in Leicester Square and other houses forming the square.³⁹ Tulk sold one property, Leicester Square Garden, to Elms. A covenant in the deed of conveyance provided that Elms, for himself, his heirs and assigns, would maintain Leicester Square Garden as a garden and leave the property vacant. Elms then sold Leicester Square Garden to the defendant Moxhay who had notice of the covenant.

³⁴ Akkermans, above n 2, 5. Note the comments by Molly Shaffer Van Houweling, 'The New Servitudes' (2008) 96 *Georgetown Law Journal*, 892, 898–9, regarding the limits to the ability of purchasers to understand the implications of notified interests over land.

³⁵ Though the existence of registration systems in the 19th century did not stop the application of the *numerus clausus* principle in the United States: Van Houweling, above n 34, 896.

³⁶ Dagan, 'The Craft of Property', above n 7, 1566.

³⁷ [1848] 2 Ph 774; 41 ER 1143.

³⁸ Akkermans, above n 2, 391–3.

³⁹ Anne Wallace, Michael Weir and Les McCrimmon, *Real Property Law in Queensland* (Lawbook, 4th ed, 2015) 855–6 [17.220].

Moxhay suggested that as there was no privity of contract with Tulk he could build on Leicester Square Garden.⁴⁰ Tulk sought to restrain Moxhay from building on Leicester Square Garden. Moxhay was probably confident of victory as before this case covenants were not enforced when there was no privity of contract between the covenantee and a new owner of the burdened property. The injunction was granted at first instance and this was upheld by the Lord Chancellor.

The decision was based on the reasoning that it would be inequitable to allow a successor in title to use the land in a manner inconsistent with the contract entered into by her or his vendor where the successor in title had purchased the property with notice of the restrictions.⁴¹

Another unstated but possibly significant reason for this judicial activism could have been an attempt to deal with the lack of a proper system of urban planning during this period for which the enforcement of restrictive covenants might have provided some remedy.⁴² Edgeworth comments '*Tulk v Moxhay* can therefore be seen as judicial endorsement of that legislative proposal at a time when statutory regulation of urban planning was virtually non-existent'.⁴³

The application of the *numerus clausus* principle has been prominent in considerations about what is or is not accepted as an appropriate easement. As stated in the pivotal authority of *Re Ellenborough Park* it is essential that the easement is capable of forming the subject matter of a grant, which brings with it a consideration of what has been previously accepted as an easement.⁴⁴ The law of easements was said to have developed largely to deal with the impact of the industrial revolution and rapid urbanisation and enclosure in England. This led to greater development and population density and the need to regulate and define the rights and obligations of neighbours.⁴⁵ Prior to that massive social and economic development there was less need to deal

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Edgeworth, above n 3, 398; Babie, 'How Property Law Shapes Our Landscapes', above n 5, 11, 13.

⁴³ Edgeworth, above n 3, 398.

⁴⁴ [1956] 1 Ch 131, 164 (Evershed MR).

⁴⁵ Babie, 'How Property Law Shapes Our Landscapes', above n 5, 6, 11; Van Houweling, above n 34, 892.

with these issues. Although the law relating to easements contains some flexibility to deal with new forms of easement,⁴⁶ many proposed easements have not been supported.⁴⁷

A more recent example of the implicit application of the *numerus clausus* principle is *Clos Farming Estates Pty Ltd (rec and mgr apptd) v Easton*,⁴⁸ where a vineyard and farm comprising 80 residential lots, the servient tenements, provided easements to the purported benefit of the dominant tenement that was a small parcel of neighbouring land. These easements were granted for the purpose of permitting the servient tenements to be used for viticulture and crop farming. The proceeds of that activity were to be distributed to the owners of the servient tenements. When this scheme ran at a loss, and owners of the servient tenement were asked to contribute to that loss, the validity of the easements was questioned. Santow JA concluded the easements did not accommodate the dominant tenement as there was no real and intelligible connection between the easement rights and the ordinary use of the dominant tenement or any advantage or enhancement.⁴⁹ In addition, the easement was deemed to have subordinated the rights of ownership of the servient tenement owner such that they were a shadow of the entitlements normally associated with ownership and possession leading to the conclusion the easements went beyond what easements can and should secure.⁵⁰

V PARKING EASEMENTS

One area of limited further developments in common law principles is in relation to parking easements. In *Copeland v Greenhalf*⁵¹ a right to park vehicles on another person's land was held to amount to a claim to joint possession of the land and therefore was not capable of constituting an

⁴⁶ *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348, 353–4 (Griffith CJ).

⁴⁷ See, eg, *Clos Farming Estates Pty Ltd (rec and mgr apptd) v Easton* (2002) 11 BPR 20 605; Adrian J Bradbrook et al, *Australian Real Property Law* (Thompson Reuters, 5th ed, 2011) 840–1 [17.230].

⁴⁸ (2002) 11 BPR 20 605.

⁴⁹ *Ibid* 20 610 [31], 20 613 [43].

⁵⁰ *Ibid* 20 611–12 [36], 20 613 [40]; Tony Wilson, 'What's in an Easement? More Than Just the Name' (2001) 16 *Australian Property Law Bulletin* 33, 36.

⁵¹ [1952] 1 Ch 488.

easement. In *Wright v Macadam*⁵² an easement to store coal in a shed was deemed to be appropriate subject matter for an easement while the opposite view was taken in *Grigsby v Melville*⁵³ in relation to an easement to store goods in a cellar. Recent authority is suggestive of a movement away from the stricter test preferred in *Copeland v Greenhalf* which may be suggestive of the influence of implicit or explicit public policy issues. In *White v Betalli*,⁵⁴ the New South Wales Court of Appeal dealt with a by-law under a strata scheme that granted a right to store watercraft in an area of 15 square metres as part of a larger lot. The validity of this by-law partly relied upon that right being considered a valid easement under s 88B of the *Conveyancing Act 1919* (NSW) as an easement created by a plan. The majority were content that the by-law, in granting an entitlement to use a small part of the lot, was not incompatible with the servient owner's right of possession and was a valid easement.⁵⁵ In *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd*,⁵⁶ the Western Australian Court of Appeal concluded an easement to park is in some cases supportable.⁵⁷

Wilson J in *Weigall v Toman*⁵⁸ dealt with an easement for the exclusive use of a garage on the servient tenement which allowed the owner of the dominant tenement to garage their motor vehicle as the steep gradient of the dominant tenement did not provide adequate vehicular access. Wilson J considered the authorities discussed above and suggested criteria to determine the validity of this type of easement were practicalities such as the need for access to a property, safety issues, maintenance requirements and other amenities of life.⁵⁹ Wilson J determined that the parking easement was a valid easement providing another example of the influence of public policy issues in this area and its impact on pushing the envelope of property issues. It is not unreasonable to expect, as development of land becomes more intensive and access rights and space become more of an issue, matters relevant to ease-

⁵² [1949] 2 KB 744.

⁵³ [1972] 1 WLR 1355.

⁵⁴ (2007) 71 NSWLR 381.

⁵⁵ *Ibid* 389 [39] (Santow JA), 420 [207] (Campbell JA).

⁵⁶ (2008) 37 WAR 498.

⁵⁷ *Ibid* 512 [57] (Buss JA).

⁵⁸ [2008] 1 Qd R 192.

⁵⁹ *Ibid* 199–200 [24].

ments like parking easements will become subject to public policy issues suggesting greater flexibility in the application of common law principle — thus reflecting the flexibility of the *numerus clausus* principle under the common law in appropriate cases.

VI IMPACT OF STATUTORY PROVISIONS

In recent years the ‘closed list’ aspect of the *numerus clausus* principle is being increasingly disrupted at a level not normally witnessed at common law by the impact of statutory proprietary rights leading to greater dynamism in the recognition of novel property interests.⁶⁰ Davidson considers that, regarding the modification of the forms of property acceptable under the *numerus clausus* principle, ‘[i]f any pattern is discernable, it is that legislative change has predominated, but courts do, at times, innovate’.⁶¹ Statute has long intervened into the area of easements for public purposes; for example by allowing easements in gross (an easement without a dominant tenement) which would otherwise be impossible in the light of the common law requirement for both a servient and dominant tenement.⁶² These statutory provisions secure the public benefit through the provision of essential services such as power, water and sewerage and drainage to burgeoning urban areas and would have been difficult under common law principles.⁶³ In the years 1641–47 an ordinance in England reversed common law principles and extended the land of riparian landowners from high to low tide to allow landowners to claim more land for transport corridors which were required to deal with the requirements of industry and society at that time as the industrial revolution developed.⁶⁴ The developments through statutory initiatives, it is suggested, are a disruption of the *numerus clausus* principle as its derivation from the common law relied upon a ‘college of expert opinion’ view of what should or should not be considered a valid property interest.⁶⁵ Introduced statutory forms of property challenge the acknowledged limits of common

⁶⁰ Merrill and Smith, above n 8, 59; Di Robilant, above n 4, 368–9.

⁶¹ Davidson, above n 6, 1617.

⁶² *Re Ellenborough Park* [1956] 1 Ch 131, 164 (Evershed MR).

⁶³ Victorian Law Reform Commission, *Easements and Covenants*, Consultation Paper (2010) 16 [2.19], ch 4; See, eg, *Conveyancing Act 1919* (NSW) s 88A; *Land Title Act 1994* (Qld) s 89.

⁶⁴ Babie, ‘How Property Law Shapes Our Landscapes’, above n 5, 13.

⁶⁵ Edgeworth, above n 3, 391.

law property interests, unlike the civil law version of this meta-principle where there is an explicit recognition of the exclusive province of the legislature to determine acceptable property interests.⁶⁶

Future statutory developments in types of property interests⁶⁷ are seen as having the advantage of ‘clarity, universality, comprehensiveness, stability, prospectivity, and implicit compensation’.⁶⁸ The common law initiatives impacted by the *numerus clausus* principle and its hodgepodge processes have proven it is not well suited to deal with large scale issues effectively and in a timely manner.⁶⁹ Economic competition between different jurisdictions to compete domestically and globally through less restrictive or innovative regulation may impact on the legislative vigour of Parliament in this area.⁷⁰ Edgeworth supports the role of statutory amendments to deal with developments in proprietary interests:

Because of the prime importance for certainty of the boundaries of property, property rights should not be routinely modified, revised or added to, by judges. The kind of root-and-branch revision of the range of property interests displayed in *Tulk v Moxhay* is better left to, and undertaken by, legislatures, as is demonstrated by the uncertainty and judicial disagreement that that decision generated over the latter half of the 19th Century in England. So the enactment in 1987 in New South Wales of amendments to the *Conveyancing Act* defining forestry rights and carbon sequestration rights as ‘profits à prendre’ is a preferable solution to the problem than a judicial reworking of the boundaries of the profit would be.⁷¹

The Torrens title itself is an example of the impact of statute into our legal system. The reasons for the introduction of the Torrens title system are well known and based upon a desire to move away from the inefficient, costly,

⁶⁶ Davidson, above n 6, 1616.

⁶⁷ Babie, ‘How Property Law Shapes Our Landscapes’, above n 5, 19–20.

⁶⁸ Merrill and Smith, above n 8, 61.

⁶⁹ Babie, ‘How Property Law Shapes Our Landscapes’, above n 5, 19; Hanoch Dagan, ‘Judges and Property’ in Shyamkrishna Balganeshe (ed), *Intellectual Property and the Common Law* (Cambridge University Press, 2013) 17–18.

⁷⁰ Davidson, above n 6, 1617–18.

⁷¹ Edgeworth, above n 3, 418 (citations omitted).

insecure style of old system conveyancing.⁷² The concept of indefeasibility of title introduced by the Torrens system and the reform of the *nemo dat quod non habet* rule was a significant reform of the law of property in Australia and many other parts of the world.⁷³ Although it did not initially provide new categories of property interests, it had the impact of markedly changing the nature and enforceability of property interests and the ability to make those interests binding on subsequent owners. The now-ubiquitous nature of Torrens title in Australia and many common law jurisdictions extends to several non-common law and developing countries.⁷⁴ In many jurisdictions the creation by statute of strata title, community title schemes or common interest communities permits the development of residential, commercial and industrial communities which provide for individual titles to owners overlaid with sophisticated enforceable covenants and joint ownership of common property. In addition, these structures make provision for management structures and controls on activity within those schemes including controls on architectural features of improvements through by-laws.⁷⁵

One of the most recent examples of the primacy of legislation in dictating what novel statutory property interests can be created is provided in Queensland, under recent amendments to the *Land Title Act 1994* (Qld) pt 6 div 4AA which introduce the concept of a 'High Density Development Easement'. In a number of Australian states there is an existing entitlement to seek the creation of a court-imposed easement to protect an encroachment as one means of dealing with an encroachment.⁷⁶ The common law on whether an easement can protect an encroachment or projecting object lacks clarity.⁷⁷ For policy reasons, Queensland legislation on high-density development ease-

⁷² B J Edgeworth et al, *Sackville and Neave Australian Property Law* (LexisNexis Butterworths, 8th ed, 2008) 454–67 [5.1]–[5.26].

⁷³ *Ibid* 454–6 [5.1]–[5.4].

⁷⁴ See Tony Burns, 'Land Administration Reform: Indicators of Success and Future Challenges' (Agriculture and Rural Development Discussion Paper No 37, World Bank, 2007).

⁷⁵ The *Strata Schemes (Freehold Development) Act 1973* (NSW) facilitates the subdivision and development of land with shared property. It deals with, inter alia, plan requirements and registration, changes to the subdivision and dealings with the lots. See also *Body Corporate and Community Management Act 1997* (Qld).

⁷⁶ *Encroachment of Buildings Act 1922* (NSW) s 3(2); *Property Law Act 1974* (Qld) s 185(1).

⁷⁷ *Kostis v Devitt* (1979) 1 BPR 9231; see also Wallace, Weir and McCrimmon, above n 39, 109 [4.160].

ments overrides these common law doubts and extends beyond the common law envelope for a valid easement.

The *Land Title Act 1994* (Qld) pt 6 div 4AA now provides for a high-density development easement for support, shelter, projections, maintenance or roof water drainage over two small adjoining lots, and common walls for adjoining properties. A 'small lot' under these provisions means the lot has an area of 300 square metres or less. The reason for these amendments is made clear in the explanatory notes which focus on the public interest, planning and the reduction in cost and complexity:

As part of urban densification and urban renewal, one type of development is the creation of small lot subdivisions, where lot sizes are much smaller than traditional development lot sizes, typically 70m² to 300m². The size of these lots necessitates unique architectural solutions to provide suitable living spaces. This invariably leads to the design of a dwelling where there are common walls shared with adjoining dwellings ('terrace type houses'). These lots are being created as standard format lot subdivisions rather than community title schemes under the *Body Corporate and Community Management Act 1997* and therefore the statutory easement provisions of *Land Title Act 1994* for community titles schemes do not apply. For that reason, these developments currently require the use of multiple two party easements, for support, party walls, services and projections and minor encroachments, which are surveyed and registered on title.⁷⁸

This legislative reform provides for the registration of statutory easements over small terrace-type housing lots, containing buildings with shared common walls, which reduces the cost and complexity associated with registering easements for these purposes. It will also reduce the future conveyancing costs for prospective purchasers, who would generally need to obtain copies of all registered easements and seek legal advice as to the effect of each easement. This is just one of the most recent examples of the creation of a type of property interest not supportable under the common law now available by statute.

Because of the later development of the equitable concept of covenants in the middle of the 1800s, this development came too late to fit easily within the Torrens title schemes. As a result, covenants now fit uncomfortably within the

⁷⁸ Explanatory Notes, Land, Water and Other Legislation Amendment Bill 2013 (Qld) 13–14.

Torrens system in most states with the device of ‘notification’ of covenants to prevent a purchaser from relying on indefeasibility to defeat a restrictive covenant notified on a certificate of title.⁷⁹ Queensland provides a somewhat limited subset of registrable covenants. Public interest imperatives are fundamental to this statutory innovation. Statutory covenants are entered into by agreement between the landowner (as covenantor) and the state or local government (as covenantee).⁸⁰ Unlike the position at common law covenants created under these provisions may be positive or negative and are binding on the covenantor and any subsequent owner of the land after registration as applies to any registered interest. These provisions permit covenants which relate to a native animal or plant, or a natural or physical feature of the lot that is of cultural or scientific significance. Registration also provides ‘notice to anyone searching the freehold land register that a particular lot is subject to the restrictions and obligations contained in the covenant’.⁸¹

These statutory provisions reflect governmental recognition of the public interest in preserving the environmental values or a significant habitat for a particular species of flora or fauna. This statutory mechanism provides an avenue for private landowners to participate in environmental preservation without the limitations applied by the common law. The covenants may also be used to ensure that specified parcels of land remain together in the same ownership and are not transferred to different owners.⁸² Thousands of covenants have been entered into through these provisions. Initially the majority of covenants were to tie parcels of land together, but conservation and use covenants are now said to form the majority.⁸³ This is one classic example of the role of statute in pushing the envelope of property interests further; though it is clear this change is pushed by environmental issues. It is unlikely to have occurred by change at the common law level owing to the conservatism of the common law.

⁷⁹ Edgeworth et al, above n 72, 951–3 [9.87]–[9.88].

⁸⁰ Wallace, Weir and McCrimmon, above n 39, 865 [17.350].

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

VII RISKS WITH STATUTORY REFORMS

The advantage of statute-based property rights is that they may be described with clarity; they are stable and easily identified and of course come with the stamp of approval from what may be a democratically elected government.⁸⁴ O'Connor has raised issues with the trend towards the use of statute to create new forms of property interest or as she calls them 'fancies'.⁸⁵ O'Connor identifies four approaches taken by the legislature in creating property rights. One approach is 'assimilation' by equating the statutory interest to an existing property right but subject to modification.⁸⁶ The use of high density development easements discussed above would probably fall within that category. 'Analogy' is another approach when an interest is created by statute which is analogous to a conventional property right. O'Connor refers to the ability to create a positive covenant in relation to the now repealed *Victorian Conservation Trust Act 1972* (Vic) s 3A(11).⁸⁷ The provision for the registration in Queensland of positive covenants discussed above also probably falls within that category. Other categories are '[f]ull statutory specification as a new class of right' and '[s]pecification through statutory agreements'.⁸⁸ The ability to create and register a building management statement to manage a building would likely qualify as a statutory agreement.⁸⁹

The application of statutory property interests is not without its risks. Uncertainty may arise because a property right, whether common law or statutory, will generally bind third parties. This raises the issue of inconsistency between competing property interests. The long held principles of the *numerus clausus* principle permit confidence in the ability of fragmented property interests, based upon well understood and defined criteria, generally to fit together as a cohesive whole. There are significant policy reasons to limit unbridled expansions of approved property interests including statutory rights.⁹⁰

⁸⁴ Di Robilant, above n 4, 400.

⁸⁵ A term used in *Keppell v Bailey* (1834) 2 My & K 517, 535; 39 ER 1042, 1049 (Brougham LC); O'Connor, above n 23, 44.

⁸⁶ O'Connor, above n 23, 52–3.

⁸⁷ *Ibid* 53.

⁸⁸ *Ibid* 53–4.

⁸⁹ *Land Title Act 1994* (Qld) pt 4 div 4.

⁹⁰ Di Robilant, above n 4, 395.

Merrill and Smith contemplate, from an economics perspective, an optimal number of property forms can avoid undue information costs incurred by third parties who seek to acquire property rights or avoiding breaching those rights.⁹¹ O'Connor criticises the lack of focus on the problem of incoherence that can arise 'if a new right does not fit'⁹² as courts attempt to deal with the gaps in the incidents of that new statutory right in the new scheme which may not match with common law concepts and the costs of determining the meaning of those agreements by subsequent owners or 'measurement costs'.⁹³ Of course, too few property interests may stifle economically beneficial property use.⁹⁴ Some statute-based property interests such as strata title may increase the number of owners, create a network of reciprocal obligations and increase information costs.⁹⁵ In addition, re-aggregation of distinct interests in property may be costly.⁹⁶ In addition the use of statutory agreements that may bind subsequent owners may not properly define their scope and content in a circumstance where the original contract parties are perhaps not concerned about which parts of an agreement may apply only to the parties in contract or in rem, thus impacting on subsequent owners.⁹⁷ Furthermore, perpetual conservation easements may bind future generations without reflecting contemporary choices and advances in environmental science.⁹⁸

⁹¹ Merrill and Smith, above n 8, 26–7, 38–40; Di Robilant, above n 4, 395; Akkermans, above n 2, 445–8. Note criticism of this view in Dagan, 'The Craft of Property', above n 7, 1566–70, and the views of Davidson, above n 6, 1601 (emphasis in original) where he states:

legal systems standardize property law because regulating the variety of allowable forms provides platforms onto which property law's competing social and political goals can be engrafted onto private ordering. ... [T]he phenomenon facilitates the use of property law to define, control, and regulate the *public* aspects of *private* legal relations with respect to things — the foundational *top-down* element of property law.

⁹² O'Connor, above n 23, 53.

⁹³ Ibid; Carol M Rose, 'The Moral Subject of Property' (2007) 48 *William & Mary Law Review* 1897, 1917; Di Robilant, above n 4, 395.

⁹⁴ Davidson, above n 6, 1628; Di Robilant, above n 4, 395; Merrill and Smith, above n 8, 35–8.

⁹⁵ See Abraham Bell and Gideon Parchomovsky, 'Reconfiguring Property in Three Dimensions' (2008) 75 *University of Chicago Law Review* 1015, 1034, citing Michael A Heller, 'The Tragedy of the Anti-commons: Property in Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621.

⁹⁶ Ibid, citing Francesco Parisi, 'Entropy in Property' (2002) 50 *American Journal of Comparative Law* 595, 626–7.

⁹⁷ O'Connor, above n 23, 64.

⁹⁸ Van Houweling, above n 34, 900–1.

Ignoring the application of the *numerus clausus* principle, the proliferation of new statutory property ‘fancies’ may result in excessive fragmentation of interests and lead to stagnation with a myriad of inconsistent property interests stopping development and exercise of property rights owing to the veto rights of other property rights holders sometimes referred to as ‘the tragedy of the anti-commons’.⁹⁹ This circumstance can mean none of the owners has sufficient control to properly utilise the asset and there is insufficient incentive to manage the property jointly owing to the transaction costs.¹⁰⁰ This outcome may be avoided by the application of strict boundary rules found in the *numerus clausus* principle.¹⁰¹ The solution to this potential dilemma would appear to be:

- the necessity for conservatism in the creation of such interests to circumstances where clear public interests are at issue;
- statutory drafting which is sensitive to the economic and stagnation issues described above to ensure as limited dissonance between the statutory property interest and the common law concepts as possible;
- the ability to modify or delete these interests if new circumstances arise; and
- sensitivity to the possibility of changes to public policy brought on by developments in environmental, economic and social circumstances.

VIII DEMOCRATIC AND DELIBERATIVE GOVERNANCE

A significant new dimension to the disruptive influences on the conservatism of property law is derived from the movement to apply democratic and deliberative governance to create new forms of property such as a ‘community land trust’. This structure permits residents who seek to revitalise a depressed area to collectively retain control over development to maintain affordability levels.¹⁰² Europe, drawing on the ancient regulatory vehicle of *emphyteusis*,

⁹⁹ Heller, ‘The Tragedy of the Anti-commons’, above n 95, 624, 674–5; Davidson, above n 6, 1626–7; but see Akkermans, above n 2, 442–5; *contra* Merrill and Smith, above n 8, 51–4.

¹⁰⁰ Bell and Parchomovsky, above n 95, 1034.

¹⁰¹ Michael A Heller, ‘The Boundaries of Private Property’ (1999) 108 *Yale Law Journal* 1163, 1184–5.

¹⁰² Di Robilant, above n 4, 369.

permits a planning process which is democratic by allowing affected parties to be involved in the establishment of conditions and restrictions on the use of land. These developments draw upon principles such as the public trust doctrine¹⁰³ and democracy.¹⁰⁴ Blumm in his work analyses United States cases where property rights are divided between private rights (*jus privatum*), permitting the familiar rights such as possession and alienation, and secondly *jus publicum* where private rights may be proscribed if they are inconsistent with public rights such as access rights.¹⁰⁵ Public access rights have figured in High Court of Australia decisions on native title, where the Court has on a number of occasions held that any grant of native title will usually not impact on the public rights for navigation over tidal waters.¹⁰⁶ Although many of these new concepts ultimately derive from traditional concepts of trusts, leases and common ownership, they provide a growing tip to developments in property interests — though are often reliant on the assistance of statutory measures to confirm their viability and durability. The impetus to democratic forms of property relies upon the fact that property is inherently public in nature, that is, a person's property rights involve the state in limiting the rights of third parties to protect the property interests of the owner. This raises a desire to have the entitlements of owners applied along democratic lines and with the imprimatur of legislative bodies.¹⁰⁷ Although it must be recognised that the private aspects of property are distinctly directed to property owners seeking to maximise their economic self-interest,¹⁰⁸ the modern democratic state has shown a desire to reflect the public interest in forging new and novel property interests especially when focusing on matters directly relevant to the public interest.¹⁰⁹ Blumm notes that where public assets are privatised any public interests in those assets may survive, as occurred in *Marks v Whitney*,¹¹⁰ where an attempt to fill privately owned tidal land was refused on the

¹⁰³ Michael C Blumm, 'The Public Trust Doctrine and Private Property: The Accommodation Principle' (2010) 27 *Pace Environmental Law Review* 649, 655–9.

¹⁰⁴ Davidson, above n 6, 1633.

¹⁰⁵ Blumm, above n 103, 658–9.

¹⁰⁶ *Commonwealth v Yarmirr* (2001) 208 CLR 1, 56 [61] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰⁷ Di Robilant, above n 4, 370.

¹⁰⁸ Bell and Parchomovsky, above n 95, 1025.

¹⁰⁹ Di Robilant, above n 4, 369–71.

¹¹⁰ 491 P 2d 374 (Cal, 1971).

basis of the public access rights to those lands.¹¹¹ Governments may of course legislate to create property interests which are supportive of the public economic interest by drawing on the self-interest of individuals who purchase or develop these interests. The public interest may be served through better and more secure development and releasing the greater productive capacity of fragmented property interests.¹¹² Although there are clear examples of the influence of democratic and deliberative governance in new forms of property the influence of private interests and the *numerus clausus* principle is still significant.

IX *NUMERUS CLAUSUS* AND PERSONAL PROPERTY

Property theorists such as Chafee have pondered why it was not possible to create new forms of property such as personal property servitudes which reflect the creation of restrictive covenants and easements under the common law.¹¹³ This provides potential to expand the categories of property protected beyond the *numerus clausus* principle or as a disruption of this principle. This area may prove to be a valuable source of enforceable personal property servitudes even if it is not yet fully explored; though early English and United States common law decisions were not supportive of this concept.¹¹⁴

This issue was focused by a 1955 United States authority involving the enforcement of an equitable servitude in relation to a jukebox.¹¹⁵ In that case an agreement for the lease of a jukebox in a luncheonette required rental payments of 60 per cent of the receipts and prohibited removal of the jukebox with the agreement lasting 14.5 years. The agreement purported to make the agreement binding on successors and assigns and in this sense the covenant sought to make the obligation 'run with the goods'.¹¹⁶ A new owner of the luncheonette sought to terminate the agreement which the jukebox owner resisted. The jukebox owner brought an enforcement action, which was

¹¹¹ Blumm, above n 103, 598–9, citing *ibid* 380–1 (McComb J).

¹¹² Bell and Parchomovsky, above n 95, 1027–8, 1032.

¹¹³ Zechariah Chafee Jr, 'Equitable Servitudes on Chattels' (1928) 41 *Harvard Law Review* 945; see also Robinson, above n 6, 1450–1.

¹¹⁴ *Taddy & Co v Sterious & Co* [1904] 1 Ch 354; *McGruther v Pitcher* [1904] 2 Ch 306; *John D Park & Sons Co v Hartman*, 153 F 24 (6th Cir, 1907); Van Houweling, above n 34, 907–10.

¹¹⁵ *Pratte v Balatsos*, 113 A 2d 492 (NH, 1955).

¹¹⁶ Robinson, above n 6, 1452.

successful as the Court allowed the grant of specific performance. Although Chafee had supported the concept of personal property servitudes he doubted the policy justification for such an interest on the basis of its utility for business.¹¹⁷

The use of covenants has become commonplace in relation to intellectual property involving the use of restrictive licensing agreements limiting post-sale use and transfer of copyrighted, patented goods — such as the Microsoft ‘End User Licence Agreement’.¹¹⁸ The issue of post-sale restrictions arises based upon a common law first sale doctrine which suggests that an owner of copyrighted or patented material cannot enforce that intellectual property right after the initial sale has exhausted that right.¹¹⁹ This leads inevitably to a desire by the interest holder to contractually allow enforcement of that restriction. Robinson argues that in the same way servitudes may be enforceable in real property, including restraints on alienation, they should also be available particularly in regard to intellectual property.¹²⁰ This issue may, to some extent, be resolved in some contexts by controls on intellectual property after the original sale by engineering of the product itself through technology, such as to stop the lending or sharing of ebooks through digital management tools.¹²¹ The ability to use these types of servitudes is often limited by external issues such as trade practices law or restraint of trade issues.¹²²

Robinson argues for the validity of chattel servitudes on the basis any chattel subject to the restraint may be short lived (as against a real property restraint that may survive for a very long period) and any chattel servitude will not remove a unique product from commerce as may occur for a servitude in relation to real property.¹²³ In this way Robinson is arguing against the application of the *numerus clausus* principle and the broadening of the ability to apply personal property servitudes free of the restriction of *numerus clausus*. Merrill and Smith suggest that the capacity to easily ascertain

¹¹⁷ Ibid 1451, citing Zechariah Chafee Jr, ‘The Music Goes Round and Round: Equitable Servitude and Chattels’ (1956) 69 *Harvard Law Review* 1250.

¹¹⁸ Van Houweling above n 34, 889; ibid 1451–2.

¹¹⁹ Robinson, above n 6, 1453.

¹²⁰ Ibid 1453.

¹²¹ Ibid 1516, 1520.

¹²² Ibid 1484.

¹²³ Ibid 1489–90.

information about the nature of an interest may justify, on an economic basis, less focus on *numerus clausus* in this sector of the market.¹²⁴

Most probably the better view, expressed by Van Houweling, is that the reluctance of the common law to apply servitudes to chattels is due to the issue of notice to third parties. The ability to provide notice of a property interest to a third party was a factor in the arguments for a more liberal application of *numerus clausus* discussed above for real property interests in light of the development of the Torrens system of registration. Although it is possible for a vendor of a chattel to give actual notice of some restriction to a purchaser through a label,¹²⁵ this notice needs to be considered in the context. Personal property tends to be less expensive which means purchasers may be less likely to understand and confirm the nature of any restrictive terms attached to the chattel.¹²⁶ Even if the required notice was accepted, Van Houweling argues that the use of chattel servitudes are socially undesirable in that chattels are sold rapidly and commonly and do not lend themselves to such restrictions.¹²⁷ In this sense 'slowing down the process of transferring personal property by imposing restrictions that require time and effort to understand and account for is more problematic than clogging up land transfers'.¹²⁸ Not enforcing chattel servitudes 'avoids adding an extra level of informational complexity to what might otherwise be relatively simple and fluid commerce'.¹²⁹ The use of restrictions that do not rely on possession is more problematic for chattel transactions which are normally 'frequent, simple, and fast, due to the inherent mobility and relative cheapness of chattels'.¹³⁰

X INFLUENCE OF NEW TECHNOLOGY

One force for change in the development of property interests will be new technology. Questions have already arisen such as: is a person's online

¹²⁴ Merrill and Smith, above n 8, 42.

¹²⁵ Van Houweling above n 34, 907.

¹²⁶ Ibid 914.

¹²⁷ Ibid 915.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid 915–16.

presence a property interest? Lim has recently analysed this issue in an article: 'Is an Email Account "Property"?''. Lim states:

In the physical world, the general rules of property and ownership are, on the whole, clear and defined; but in the digital realm the same cannot be said for ownership rights in relation to personal email accounts.¹³¹

Lim argues that an email account can be considered a unique form of property for testamentary purposes though currently its status is uncertain. Lim suggests that it is necessary to make reference to internet service agreements to determine the status of personal email accounts. In some cases the complete inability to assign may suggest that the email address and contents may not satisfy the normal definition of property, though assignability is not a necessary aspect of what might be considered property.¹³² Lim suggests a resort to the familiar route of statutory regulation:

It is submitted that perhaps it would be simpler for legislation to stipulate that email accounts are property. Then an account could clearly be disposed of with certainty by assignment or deletion upon one's death.¹³³

Similar issues might arise in relation to novel easements for the use of smartphones, or new forms of transport or technology. Accordingly, based upon the concepts of fairness and the need to acknowledge connections between an interest and a person or property, statute could assist the process of enforcement of common law-based interests. What other interests may become significant in the years to come? New digital servitudes may also contribute to the expansion of proprietary interests such as the limitations on purchasers of computer programs such as Microsoft Office and digital music which purport to require the purchaser to limit how they deal with those licences through reproduction and redistribution.¹³⁴

¹³¹ Hannah Yee Fen Lim, 'Is an Email Account "Property"?' (2011) 1 *Property Law Review* 59, 59.

¹³² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 165–6 (Brennan J); see generally *Re Potter* [1970] VR 352; *Hamilton v Porta* [1958] VR 247.

¹³³ Lim, above n 131, 67.

¹³⁴ Davidson, above n 6, 1611; Di Robilant above n 4, 383.

XI CLIMATE CHANGE

Climate change is a controversial but potentially significant issue for the future.¹³⁵ It has the potential to change our environment, sometimes gradually or rapidly, in dramatic ways. Will climate change influence developments in property law? Climate change and the impetus to take steps to deal with its effects have been described as ‘a diabolical policy problem’.¹³⁶ This suggests that resort to statutory solutions to the question of how to deal with the property law implications of climate change may be frequent. Although the common law has demonstrated an ability to reflect social and economic changes, these changes may not keep up with the potential policy challenges of climate change. Witness the amendments made to the *Building Act 1975* (Qld) in 2009, which made unenforceable the use of property developer covenants that were perceived as anti-green — such as covenants requiring minimum floor areas, the number of bathrooms or bedrooms and making unenforceable covenants against installation of energy efficient windows and solar hot water systems.¹³⁷ Babie acknowledges the role of climate change as having global consequences and private property in turn has an impact on climate change. Babie considers that

private property is: a legal–social relationship that facilitates the choices driving anthropogenic climate change. Second, the concept of relationship explains how, when one person enjoys choice as concerns a good or resource, they also enjoy choice as concerns those others who bear the consequence of those choices.¹³⁸

In regard to climate change, the facilitation provided by private property ‘makes possible the use of goods and resources so as to produce [greenhouse gases]’.¹³⁹ Climate change is an issue which has been the subject of great concern if not matched by real action for governments in recent years. This is

¹³⁵ Nicola Durrant, *Legal Responses to Climate Change* (Federation Press, 2010) 1–2.

¹³⁶ Ross Garnaut, *The Garnaut Climate Change Review: Final Report* (Cambridge University Press, 2008) xviii.

¹³⁷ *Building Act 1975* (Qld) ch 8A; see also Michael Weir, ‘Wither Covenants in Queensland in the Name of Sustainability?’ in Penny Carruthers, Sharon Mascher and Natalie Skead (eds), *Property and Sustainability: Selected Essays* (Lawbook, 2011) 145, 155–8.

¹³⁸ Paul Babie, ‘Idea, Sovereignty, Eco-colonialism and the Future: Four Reflections on Private Property and Climate Change’ (2010) 19 *Griffith Law Review* 527, 530.

¹³⁹ *Ibid* 534–5.

a factor which will continue to provide a significant driver for change in property law and the emphasis placed on property rights for the legislature and for the common law. Rawson comments

[w]e are living twenty-first century lives through environmental relationships that were designed around nineteenth-century conditions. Many of these relationships fail to recognize limits, and as a result they are failing us today.¹⁴⁰

The process of adaption to the laws that impact on property interests has begun, with one example being the *Byron Development Control Plan 2002* (NSW) pt J2.2. This requires a provision on the title to the land suggesting that use of the property may be limited based upon sea erosion.¹⁴¹ There are provisions limiting the use of protection works in the case of sea erosion and requiring consent from the local authority for such works, which is often refused, thus moving the adaptive burden to the landowner from the council.¹⁴² The concern about sea rises has also impacted on other planning schemes and subdivision requirements for beachside property. One might speculate whether this will impact on how the courts and legislature deal with this potential threat if and when it becomes reality.

The common law of erosion and accretion allows for changes in boundaries based upon variations in the course of rivers, lakes and the sea and the need to balance the entitlement of a landowner to continue to access water and to respect the role of the state in confirming access by the public to waterways.¹⁴³ This policy perspective will become strained as gradual movements in boundaries of both tidal rivers and the ocean may create more rapidly-than-expected increases in erosion along our waterways and resultant erosion issues. Will that create pressure for compensation rights by landowners, public moneys on erosion protection measures and perhaps a change in

¹⁴⁰ Michael Rawson, *Eden on the Charles: The Making of Boston* (Harvard University Press, 2010) 281, quoted in Babie, 'How Property Law Shapes Our Landscapes', above n 5, 17.

¹⁴¹ *Byron Development Control Plan 2002* (NSW) pt J2.2, quoted in Durrant, above n 135, 256.

¹⁴² *Coastal Protection Act 1979* (NSW) s 55K, cited in Durrant, above n 135, 257.

¹⁴³ *Southern Centre of Theosophy Inc v South Australia* [1982] 1 AC 706, 716. For an excellent treatment of this area refer to John Corkill, 'Principles and Problems of Shorelines Law' (Australian Climate Change Adaptation Research Network for Settlements and Infrastructure Discussion Paper G, National Climate Change Adaptation Research Facility, December 2012).

the common law or statutory rights for landowners for land which was formerly above the high water mark?

Currently the law favours adjustments in the position of boundaries through the use of ambulatory boundaries.¹⁴⁴ This may have significant impacts on privately-owned land, however one might speculate the controversy and political pressure that might arise in relation to rising ocean levels over a period of time. There may not be sufficient public concern about wealthy beachfront property owners losing a part of their property. That view may be swept aside by major sea level rises across whole coastlines. This might require some resolution of matters, such as — does one automatically lose land if the coastline or tidal river changes its banks over time and what entitlements does one have to preserve land from that encroachment?

Increasing temperatures may provide pressure for the development of easements for protection of shade from the sun. Currently, to deal with the common law refusal to protect one's view,¹⁴⁵ easements for light and air, or restrictive covenants may be applied.¹⁴⁶ If some predictions for world temperatures are realised, this might suggest the need to allow enforcement of protection from the sun, or shade easements.

An easement to protect light for the purposes of solar power to secure free access to the sun may become important as an alternative sustainable energy solution. This is yet to be confirmed as a proper subject matter of an easement or restrictive covenant though it appears to be a logical extension of the accepted easement for light and air.¹⁴⁷ The legislature has reacted in the United States to protect solar users with new property rights. In New Mexico, Wyoming and California, legislation declares that a right to use solar energy is a property right, while Californian legislation provides for a solar energy easement.¹⁴⁸ These developments of course create their own legal problems and issues in built-up areas dealing with development of land which may impact on these rights, but it would seem likely to be part of the future.

¹⁴⁴ See, eg, *Survey and Mapping Infrastructure Act 2003* (Qld) s 62 (definition of 'ambulatory boundary principles').

¹⁴⁵ See *Harris v De Pinna* (1886) 33 Ch D 238.

¹⁴⁶ *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348; *Colls v Home & Colonial Stores Ltd* [1904] 1 AC 179.

¹⁴⁷ Babie, 'How Property Law Shapes Our Landscapes', above n 5, 18–19; *Allen v Greenwood* [1980] 1 Ch 119.

¹⁴⁸ Babie, 'How Property Law Shapes Our Landscapes', above n 5, 20.

Similar considerations might also arise for easements for wind power.¹⁴⁹ Babie foresees future developments at common law through the use of these types of covenants¹⁵⁰ though recent history suggests changes will be statutory-based in many cases.

XII CONCLUSION

Changes in what can or cannot be deemed ‘property’ are based upon two primary influences, namely the ability of the common law to craft legal solutions to problems that arise and increasingly legislative initiatives to provide answers to public policy issues.¹⁵¹ As an example, in the *Land Title Act 1994* (Qld) and in New South Wales and Victoria, there are now a number of new statutory property interests created, described and protected in the terms of that legislation. These include building management statements,¹⁵² positive registrable covenants,¹⁵³ high density easements¹⁵⁴ and carbon abatement interests¹⁵⁵ — either developed forms of existing interests or entirely new property concepts. When one considers the boundaries of property interests, more and more one can jettison common law concepts and consider statutory-based concepts such as the *Personal Property Securities Act 2009* (Cth), Torrens title, easements for encroachments and restrictive covenants. It is suggested that this trend will continue as the desire to avoid uncertainty and impatience with the slow progress of common law, economic efficiency issues, climate change and the need to compete in a global market continues. While the *numerus clausus* principle will no doubt continue to have an impact on how property law is considered, the role of statute in property law — and in particular in regard to pushing the envelope of property law interests into areas where the common law did not permit property to go — will likely only increase. The analysis above suggests that the *numerus clausus* principle is

¹⁴⁹ Ibid 22–3.

¹⁵⁰ Ibid.

¹⁵¹ Ibid 19–20.

¹⁵² *Land Title Act 1994* (Qld) pt 4 div 4.

¹⁵³ *Conveyancing Act 1919* (NSW) s 88BA; *Land Title Act 1994* (Qld) pt 6 div 4A; *Victorian Conservation Trust Act 1972* (Vic) s 3A.

¹⁵⁴ *Land Title Act 1994* (Qld) pt 6 div 4AA.

¹⁵⁵ *Conveyancing Act 1919* (NSW) pt 6 div 4; *Land Title Act 1994* (Qld) pt 6 div 4C; *Climate Change Act 2010* (Vic) pt 4.

increasingly overridden by statute and by the relentless progress of technology and social change.¹⁵⁶ There are dangers to these developments that economists and property lawyers have raised in regard to an unleashing of unsustainable numbers of property interests, which may have the impact of stultifying and making more complex our property law landscape. Though it seems that greater speed of change is approaching. As Babie suggests:

as the changing ways that humans interacted with others and with the landscapes around them produced new property law vehicles to make that interaction possible, the process did not stop with the modern urban cityscapes that we now inhabit. It is ongoing, and we can expect that law will continue to play its role in what our future landscapes will look like.¹⁵⁷

¹⁵⁶ Di Robilant, above n 4, 368–9, 395.

¹⁵⁷ Babie, ‘How Property Law Shapes Our Landscapes’, above n 5, 15.