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DOES DISCRIMINATION LAW APPLY TO RESIDENTIAL STRATA SCHEMES?

CATHY SHERRY*

Although strata title legislation is over 50 years old, a number of important questions about its intersection with other areas of law remain unanswered. One such question is whether discrimination law applies to residential strata schemes. Discrimination law was enacted to ensure all citizens' equal civic participation, and although it regulates both private citizens and private land, it only does so to the extent that they affect others' ability to participate in public life. Discrimination legislation typically captures the provision of goods and services, education, employment, clubs and associations, access to public space, accommodation and the disposition of land. Strata bodies corporate do not fit neatly into any of those categories. However, bodies corporate wield considerable power over residents' properties and lives, and the capacity to use that power in discriminatory ways is real. As ever-increasing numbers of Australians choose or are compelled to live in strata schemes, the need to resolve this legal dilemma becomes more pressing.

I INTRODUCTION

Residential strata schemes present difficulties in relation to discrimination law that have not been sufficiently appreciated by state legislatures. The difficulty stems from the fact that discrimination law generally applies in the public sphere, for example in employment, the provision of goods and services, accommodation and education, and residential strata schemes fall into the private sphere, because they are private residential property, generally not accessible to the public, and managed and controlled by their private owners.¹ Individual lots are privately owned, but so too is the common property, albeit by a number of people as tenants in common. As a matter of law, we are entitled to be discriminatory in our private lives and in relation to our homes. While I may not be liked for refusing to allow an assistance animal into my non-strata home or refusing to retrofit my house for disability access, I am not doing anything illegal.² Prima facie, owners of strata properties, as the owners of non-publicly accessible private property, are in the same position.³ Although there is some case law now challenging this position, it is piecemeal and inconsistent between jurisdictions.

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¹ This article is limited to residential strata schemes, which constitute the majority of schemes in Australia. However, there are also commercial, industrial and tourist strata schemes which are generally publicly accessible. These are outside the consideration of this article.

² *Allen v United Grand Lodge of Queensland* [1999] EOC ¶92-985.

³ Strata schemes do not escape the application of discrimination legislation entirely. There are some activities of a strata scheme that are irrefutably captured, specifically when they involve third parties. For example, members of an executive committee are obviously prohibited from sexually harassing their strata or building manager: *Anti-Discrimination Act 1977* (NSW) s 22B; or engaging in racial discrimination when employing a tradesman: *Racial Discrimination Act 1975* (Cth) s 15.

The possibility that discrimination law does not apply to strata schemes or to key aspects of their management is unsatisfactory. Strata title gives private citizens the power to make decisions about other peoples' property, including their homes, and thus lives.⁴ The collective decisions that are made about lots and common property in a strata scheme are not the same as the decisions that are made about other private property. For example, a couple mutually deciding they will not allow any animals, including assistance animals, into their co-owned, non-strata property is not the same as a body corporate making that decision. This is because a body corporate is potentially excluding an assistance animal not only from co-owned common property, but from privately-owned or rented homes. The legislative structure of strata schemes makes it untenable to treat them as though they are ordinary residential, private property.

As exponentially increasing numbers of Australians are living in strata schemes or body corporate estates⁵ as a result of state urban consolidation policies, this problem is becoming more pressing. The New South Wales ('NSW') Government predicts that within 20 years, half of the State's population will live or work in a strata or community scheme.⁶ Current plans aim to make an expanded Melbourne city centre Australia's largest business and residential centre by 2040.⁷ Millions of Australians are now subject to powers wielded by their neighbours that may or may not be constrained by discrimination legislation.

This article attempts to address the legal challenges that strata schemes create in relation to discrimination law and set out the best path forward. The article is divided into four parts. Part II establishes the private nature of strata schemes as land and organisations, highlighting the problems that this characterisation produces. Part III turns to the United States of America ('United States'), where private residential associations are widespread, long standing, and constitute the model for developments being constructed in Australia. The Part looks at ground-breaking efforts to protect civil rights in the United States and their specific application to residential associations. Part IV turns back to Australia and considers the limited and conflicting case law to date. The conclusion identifies the optimal way forward so that the rights of all Australians are protected on the land that is most fundamental to our wellbeing, our homes.

II STRATA SCHEMES AND THE PUBLIC/PRIVATE DIVIDE

⁴ Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017) ('*Strata Title Property Rights*').

⁵ Body corporate estates are large, master planned estates that can include low and high-rise housing. Legally, their structure is identical to an apartment building. People buy an individual Torrens lot, which might be a house, townhouse or parcel of vacant land, and immediately become a co-owner of common property, which will include the streets, parks, and infrastructure. All owners are members of a governing body corporate, which has the power to create and enforce privately written by-laws. Body corporate estates range from 'lifestyle' estates, built around golf courses and marinas, to intentional communities or communes. In some states, these are known as 'community title': see Sherry, *Strata Title Property Rights* (n 4) 27–31.

⁶ NSW Fair Trading, 'Strata Title Law Reform: Strata & Community Title Law Reform Position Paper' (Position Paper, NSW Government, November 2013) 2.

⁷ State of Victoria, Department of Transport, Planning and Local Infrastructure, *Plan Melbourne* (Report, May 2014) 39.

A strata scheme is both a subdivision of land⁸ and a legal entity represented by a body corporate made up of all owners.⁹ Both the land and the legal entity are private. While privately owned land and privately run entities do fall within the ambit of discrimination legislation, as a general rule, the trigger is for the land or the entity to be open to the public or for the entity to engage in some kind of public activity, such as the provision of goods and services, education, accommodation or employment.

This is because the function of discrimination legislation is to ensure all people's participation in public or civic life. Discrimination legislation has its roots in the duty imposed by the common law on innkeepers and common carriers to serve all without distinction. Blackstone records that when 'an innkeeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way'.¹⁰ If a person was turned away without good reason, a private wrong occurred giving rise to an action on the case. The rule applied to trades and, by necessary extension, to the private property of people offering trades and services. Thus, the rule limited the operation of two fundamental principles of private law: freedom of contract (or more accurately freedom *not* to contract), and the right to exclude others from our property.¹¹ However, the common law duty was limited to common carriers and innkeepers, proving radically insufficient to protect all citizens from discrimination that limited their full participation in public life. This became particularly evident during the civil rights era in the United States. Individual states gradually enacted legislation to fill holes left by the common law, culminating in the federal enactment of the *Civil Rights Act of 1964* which prohibited discrimination on the grounds of race, colour, religion, or national origin in the areas of voting, employment, public facilities, education, federally funded programs, and 'public accommodations' (hotels, motels, restaurants and theatres).¹² 'Public accommodations' were particularly significant because of notorious 'Jim Crow laws', which, inter alia, mandated racial segregation in restaurants and entertainment venues in many states. Notably, legislation captured limited private property, reflecting the common law rule.¹³ Four years later, civil rights legislation was extended by the enactment of Title

⁸ 'Land' theoretically stretches from the centre of the earth to the heavens and thus includes air. When we own land, we do not own a section of the surface of the earth, we own a column of space which, subject to planning law, we are able to subdivide vertically and transfer: Brendan Edgeworth, *Butt's Land Law* (Lawbook Co, 7th ed, 2017) 44 [2.20].

⁹ For example, the *Strata Schemes Development Act 2015* (NSW) s 4, defines a 'strata scheme' as:

- (a) the way a parcel is subdivided under this Act into lots or lots and common property, and
- (b) the way unit entitlements are allocated under this Act among the lots, and
- (c) the rights and obligations, between themselves, of owners of lots, other persons having proprietary interests in or occupying the lots and the owners corporation, as conferred or imposed under this Act or the *Strata Schemes Management Act 2015*.

Note, NSW uses the term 'owners corporation', as does Victoria, but this article will use the original and more generic term 'body corporate'. The terms are identical in meaning.

¹⁰ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–70) bk 3, 164; see Joseph William Singer, 'No Right to Exclude: Public Accommodations and Private Property' (1996) 90(4) *Northwestern University Law Review* 1283, 1309–10; Paul Vincent Courtney, 'Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach' (2015) 163(5) *University of Pennsylvania Law Review* 1497, 1504–8.

¹¹ Blackstone (n 10) bk 2, 3; Note, 'The Antidiscrimination Principle in the Common Law' (1989) 102(8) *Harvard Law Review* 1993.

¹² Pub L No 88-352, 78 Stat 241.

¹³ Courtney (n 10) 1513.

VIII of the *Civil Rights Act of 1968*, known as the *Fair Housing Act*,¹⁴ which prohibited discrimination in housing. The key to all civil rights legislation was that unlike constitutional provisions, which applied to state actors, it applied to the acts of private citizens.

Other common law jurisdictions followed the United States' lead, addressing the deficiencies in the common law with legislation, including Australia. The Hon John Toohey once noted that

it is a matter for profound regret that the common law did not develop over time principles which were at odds with the discriminatory treatment of persons by reason of their race or sex. ... In the end discrimination has been outlawed through the actions of the legislatures rather than the courts.¹⁵

The Whitlam Government took the lead in Australia by enacting the *Racial Discrimination Act 1975* (Cth). Although this Act, along with other federal Acts,¹⁶ was enacted pursuant to the external affairs power in order to domestically implement international treaties that Australia had ratified,¹⁷ all Acts reveal their common law antecedents, as well as bearing a close resemblance to United States civil rights legislation. The international treaties are expressed in general terms, for example, imposing obligations to guarantee '[t]he right to own property alone as well as in association with others' and '[t]he right to housing'.¹⁸ How those rights are guaranteed is left to state parties. Australia followed the common law precedent of prohibiting discrimination in the provision of goods and services, as well as access to public places, and like the United States, extended legislation to include employment, education, the disposition of land and the provision of accommodation.

However, at both the federal and state level, legislation only regulated the activities of private citizens to the extent those activities affect others' participation in public life. For example, throughout its 1999 review of the *Anti-Discrimination Act 1977* (NSW), the New South Wales Law Reform Commission ('NSWLRC') consistently used the public/private divide as the primary analytic tool to determine if the legislation should be extended.¹⁹ This is because the importance of people being able to participate fully in life, irrespective of race, gender, sexuality, disability or other relevant characteristic, must be balanced with the liberal democratic principle of personal autonomy. That

¹⁴ 42 USC §§ 3601–19 (2012).

¹⁵ John Toohey, 'A Matter of Justice: Human Rights in Australian Law' (1998) 27(2) *University of Western Australia Law Review* 129, 134, 137.

¹⁶ See, eg, *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

¹⁷ The High Court confirmed this power in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. See also *Allen v United Grand Lodge of Queensland* [1999] EOC ¶92-985 for a discussion of the international antecedents of s 23 of the *Disability Discrimination Act 1992* (Cth) requiring access to public premises.

¹⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 5(d)(v), 5(e)(iii).

¹⁹ Feminists have validly critiqued the public/private divide for its role in the law's failure to protect women and children from violence and exploitation perpetrated in private space. For a discussion of the public/private distinction, see New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) [4.3]–[4.18].

includes the right to form or not form personal relationships, as well as the right to exclude people from our private property. Private property, in particular our homes, are the places in which we are most able to realise our personal autonomy and freedom. As a result, discrimination law does not generally regulate privately-owned residential space²⁰ or private relationships.

Determining the boundaries of public life – specifically when actions done on private land or by private citizens become public – is not always easy. In order to tackle this issue with reference to strata schemes – that is, ‘are strata schemes entirely private or are they private property/entities with public effect?’ – some basic attributes of strata law need to be clarified.

First, all land (which includes air) within a residential strata scheme is prima facie non-publicly accessible private property. This is obvious in relation to individually owned apartments, but common property is apt to confuse because it is accessed by a range of people, and in large schemes they can number in their hundreds or even thousands. However, those people are no more than the owners of the common property (all individual lot owners) and their tenants, as well as anyone to whom those people have given express or implied invitations to be on common property. That group does not include the public. The public are no more entitled to be on the paths, in the foyer or carpark of a residential strata scheme than they are to be on the paths, entrance or garage of a freestanding, non-strata title house.

The private nature of strata scheme land was confirmed in *Hu v Stansure Strata Pty Ltd* (‘Hu’),²¹ in which the Federal Circuit Court had to consider whether section 18C of the *Racial Discrimination Act 1975* (Cth) could apply to actions that occurred inside a strata scheme. Section 18C provides that it is an offence to offend, insult, humiliate, or intimidate someone on the basis of race, ‘otherwise than in private’. Section 18C(2) provides that an act is not done in private if it causes words, sounds, images or writing to be communicated to the public, is done in a public place, or is done in the sight or hearing of people who are in a public place. ‘Public place’ is defined in section 18C(3) to include ‘any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place’. While Burnett J was adamant that the alleged acts had not occurred, concluding that the applicant suffered from delusions, his Honour was equally adamant that strata scheme land, including its common property, was not a public place.²²

²⁰ *Allen v United Grand Lodge of Queensland* [1999] EOC ¶92-985. In deference to privacy in the home, the *Racial Discrimination Act 1975* (Cth) s 15(5) specifically exempts employment inside a flat or a dwelling house from the general prohibition on racial discrimination in employment. Section 12(3) of the Act also provides an exception in relation to the provision of accommodation if the accommodation is in a dwelling-house or flat that is to be shared. Whether these exemptions are justifiable is open to question.

²¹ [2014] FCCA 905 (‘Hu’).

²² *Ibid* [36]–[50]. In *Comensoli v Passas* [2019] NSWCATAD 155, the respondent was found guilty of homosexual vilification in relation to statements she yelled in an apartment complex in Ashfield, Sydney. However, the respondent conceded that the acts occurred in public, and the Tribunal held that in addition to being audible in the complex, the respondent’s statements were audible in surrounding areas. The Tribunal held at [39] that ‘the audience or likely audience was the general public and residents in and near the Applicant’s residence’.

The development of very large strata schemes and body corporate estates in recent decades has muddied the waters.²³ These are the developments that have mushroomed on disused industrial sites and on the fringes of our large cities. Under the influence of Jane Jacobs-inspired planning theories favouring mixed-use development,²⁴ large-scale schemes often include commercial businesses and outdoor space that are open to the public.²⁵ These might be shops, gyms, restaurants, plazas, parks and boardwalks. However, developments with these kinds of facilities constitute a small proportion of strata schemes in Australia.²⁶ Further, only sections of those schemes are open to the public. The recent decision in *Owners Corporation OCI-POS539033E v Black* ('*Black*'),²⁷ the first Victorian case to consider the application of discrimination law to a strata scheme, concerned such a scheme and will be discussed in detail in Part IV. For now, it is sufficient to note that the decision in *Hu* accurately describes the nature of most strata scheme land.

Second, the finances and land of a strata scheme are managed and administered by a body corporate (also known as an owners corporation, strata corporation or even community or neighbourhood association). This is simply the collective owners. In theory, body corporate activities are nothing more than landowners looking after their own land, just as co-owning spouses do when they jointly decide to spend savings painting, renovating or insuring their family home. The body corporate might be assisted by a strata or building manager, but they are merely agents of the body corporate with no independent authority in relation to the scheme. Body corporate activities are not performed for the public or even a section of the public. Body corporate activities are private citizens acting in their collective capacity for the benefit of their individual selves.

However, the bigger the body corporate, the less power any individual owner has to sway its decisions, and the more a body corporate starts to look like a mini, private government. In recent decades developers and local councils have favoured 'exclusive', 'lifestyle' or 'resort style' developments with hundreds or thousands of residents, who have access to extensive private facilities. Jacksons Landing in Sydney's inner city is comprised of 19 strata schemes with 2,500 residents.²⁸ Body corporate communities

²³ See, eg, *Kimble v Orr* [2003] NSWADT 49 in which the Tribunal held that the racial vilification which occurred on the common property of a large scheme with multiple buildings constituted a public act.

²⁴ Jane Jacobs, *The Death and Life of Great American Cities* (Random House, 1961).

²⁵ For readers unfamiliar with these developments, estate websites are often the best way to appreciate their physical and social form. See, eg, 'Breakfast Point', *Breakfast Point* (Web Page) <<http://www.breakfastpoint.com>>; 'Sydney's New Downtown', *Central Park Sydney* (Web Page) <<https://www.centralparksydney.com/>>; 'Rouse Hill Town Centre', *Rouse Hill Town Centre* (Web Page) <<https://www.rhtc.com.au/home>>. Most body corporate estates in Australia are not gated, with the notable exception of Sanctuary Cove: 'Sanctuary Cove', *Sanctuary Cove* (Web Page) <<http://sanctuarycove.com/>> and Hope Island: 'Home', *Sanctuary Gardens: Hope Island* (Web Page) <<http://www.sanctuarygardens.com.au/>> on the Gold Coast, and Macquarie Links: 'Welcome', *Macquarie Links Estate* (Web Page) <<http://macquarielinksestate.com.au/>> in south-west Sydney.

²⁶ Only large strata schemes can contain extensive open space and facilities, and large schemes constitute the minority of schemes in Australia. By way of example, only 3.6% of schemes in Greater Sydney have more than 50 lots: City Futures Research Centre, *Strata Data 2015: Residential Strata in NSW* (Data Report No 6, June 2016) 14.

²⁷ (2018) 56 VR 1 ('*Black*').

²⁸ 'Jackson's Landing Community Management Statement: DP270215' (Management Statement, 15 December 2015) <<https://jacksonslanding.net.au/wp-content/uploads/2019/05/31057-NSW->

make up the bulk of new housing and infrastructure in areas like the northern end of the Gold Coast. It can be argued that these bodies corporate are performing quasi-public, local government functions, and it is not uncommon to hear bodies corporate referred to as the 'fourth tier of government'.²⁹

Despite this, case law suggests that a body corporate's activities do not cause it to fall on the public side of the public/private divide. In *James v Owners Strata Plan No SP 11478 [No 4]*,³⁰ Ball J held that a compulsorily appointed strata manager,³¹ carrying out the functions of a body corporate, did not have a duty to afford procedural fairness to lot owners. His Honour found that while the duty to afford procedural fairness has sometimes been applied to 'private bodies which are sufficiently public in nature',³² such as the New South Wales Trotting Club,³³ a body corporate did not fall into that category. His Honour concluded that although exercising a statutory power,

that power is concerned with the administration of private property in which a number of individuals have an interest. ... When an owners corporation makes a decision that affects other owners, it is not exercising a 'public power' and does not need to afford procedural fairness.³⁴

We can see that while both strata scheme land and bodies corporate are private, there is some fuzziness around the edges. Small amounts of strata scheme land are now publicly accessible, and bodies corporate are separate legal entities performing functions independently of the will of individual members.

III UNITED STATES LAW ON HOUSING DISCRIMINATION AND PRIVATE RESIDENTIAL ASSOCIATIONS

We now turn to the law of the United States, the jurisdiction that has a fourfold relevance to the subject of this article. First, the United States is the jurisdiction with more experience of private residential communities than any other.³⁵ Second, United States residential associations are the model for Australia's large-scale strata schemes

Image-Deposited-Plan-270215Management-Statement.pdf>. See community website at Jacksons Landing: 'Welcome', *Jacksons Landing* (Web Page) <<http://www.jacksonslanding.net.au/>>.

²⁹ Hazel Easthope, Bill Randolph and Sarah Judd, *Governing the Compact City: The Role and Effectiveness of Strata Management* (Final Report, May 2012) 1.

³⁰ [2012] NSWSC 590.

³¹ If a strata scheme is dysfunctional, or an owners corporation is failing to carry out some or all of its obligations under the Acts, the NSW Civil and Administrative Tribunal can appoint a strata managing agent to carry out some or all of the functions of the body corporate: *Strata Schemes Management Act 2015* (NSW) s 237. The appointment of a strata managing agent was previously a responsibility of an adjudicator: *Strata Schemes Management Act 1996* (NSW) s 162.

³² *James v Owners Strata Plan No SP 11478 [No 4]* [2012] NSWSC 590, [52].

³³ *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242.

³⁴ *James v Owners Strata Plan No SP 11478 [No 4]* [2012] NSWSC 590, [53].

³⁵ Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, 1994) ('*Privatopia*'). By way of contrast, the United Kingdom has very few low-rise private residential associations, and despite having 'commonhold' title, the equivalent of strata title, apartments in the United Kingdom (with the exception of Scotland) are still regulated by long term leases: Law Commission, *Reinvigorating Commonhold: The Alternative to Leasehold Ownership* (Consultation Paper No 241, 10 December 2018).

and body corporate estates.³⁶ Third, United States residential associations played a central role in perpetrating longstanding, widespread, entrenched housing discrimination, highlighting the danger posed by private citizens being given the power to regulate land and communities. Finally, housing discrimination was one of the key drivers for the enactment of United States' civil rights legislation which extended prohibitions on discrimination beyond acts perpetrated by the state to those perpetrated by private citizens. As noted above, United States civil rights legislation then became the model for discrimination law in much of the common law world, including Australia.

As a result of an anomaly in United States property law, which allows the imposition on freehold land of positive obligations to pay money, private communities with privately owned and funded facilities have existed for well over a century.³⁷ They grew exponentially in the post-WWII period and as at 2009, house over 60 million Americans.³⁸ To help readers visualise these communities, they are the uniform suburban subdivisions, with country clubs and golf courses, we often see on American TV. They include communities like Reston, Virginia,³⁹ or the Disney Corporation community, Celebration, Florida,⁴⁰ with private roads, parks and 'town centres'. For readers with a tolerance for reality television, *The Real Housewives of Orange County* is filmed in one of Orange County's oldest residential homeowner associations, Coto de Caza. Coto de Caza has over 4,000 homes and 13,000 residents.⁴¹

Legally, private residential communities are either condominiums (strata title) or homeowner associations (body corporate estates), characterised by shared facilities (common property), governing associations (bodies corporate), and most significantly, extensive regulation restricting membership, land use and behaviour. This regulation is contained in privately written covenants, conditions and restrictions ('C, C & Rs'),⁴² as well as association rules (strata by-laws). C, C & Rs have played a crucial role in residential associations being used as tools for discrimination.

As a result of its history, most notably slavery, as well as the founding story of the Pilgrim Fathers' desire to create a new society in accordance with their own religious values,⁴³ the United States has been fixated on segregation in a way that Australia has not.⁴⁴ Segregation applied not only to public places, but also in the private residential sphere. After racially-restricted zoning was declared unconstitutional in 1917, private

³⁶ Cathy Sherry, 'Land of the Free and Home of the Brave? The Implications of United States Homeowner Association Law for Australian Strata and Community Title' (2014) 23(2) *Australian Property Law Journal* 94 ('Land of the Free').

³⁷ Ibid 95.

³⁸ Evan McKenzie, *Beyond Privatopia: Rethinking Residential Private Government* (Urban Institute Press, 2011) 2 ('*Beyond Privatopia*').

³⁹ 'Welcome to Reston', *Reston Association* (Web Page) <<http://www.reston.org/RestonAssociation-Home/tabid/144/Default.aspx>>.

⁴⁰ 'Welcome to Celebration', *Celebration Florida* (Web Page) <<http://www.celebration.fl.us/>>.

⁴¹ See City Guide: 'The History', *City Guide: Coto de Caza* (Web Page) <<http://www.orangecounty.net/cities/CotoDeCaza.html>>.

⁴² These are positive and restrictive covenants, and easements, which Americans collectively refer to as 'servitudes'.

⁴³ Nathaniel Philbrick, *Mayflower: A Story of Courage, Community and War* (Viking, 2006).

⁴⁴ This is not to say that Australia has no history of segregation. We do, most obviously the confinement of Indigenous people to missions and reserves: see generally Henry Reynolds, *Dispossession: Black Australians and White Invaders* (Allen & Unwin, 1989) 182–214.

real estate developers and lawyers began to routinely impose *Tulk v Moxhay* freehold covenants on residential subdivisions restricting occupation and ownership of land to Caucasians.⁴⁵ The result was widespread residential apartheid which effectively prevails in many neighbourhoods to this day.⁴⁶

In the post-WWII period, concerted efforts were made to eradicate racial and other discrimination in housing, focusing on activities of both the state and private citizens. Four initiatives were aimed at private residential associations.

The first was the decision in *Shelley v Kraemer* ('*Shelley*'),⁴⁷ the Supreme Court case which declared racially restrictive covenants unconstitutional. In a perfect illustration of the difficulty of the public/private divide, the Court held that as a private property right voluntarily agreed to by private citizens, the racially restrictive covenant in question was valid, but that its public, court enforcement would violate the Fourteenth Amendment which guarantees that states provide equal protection of law to all citizens. Somewhat inexplicably, *Shelley* has never been applied to the vast array of other discriminatory covenants that existed and continue to exist in the United States, although covenants all ultimately depend on state enforcement.

This may be a result of the second, and arguably most significant attack on discrimination in private housing, the passage of Title VIII of the *Civil Rights Act of 1968*, also known as the *Fair Housing Act*.⁴⁸ The Act was passed in the context of race riots raging after the assassination of Dr Martin Luther King Jr and was intended to combat the huge range of ways in which people were discriminated against in housing, from advertising to financing. Unlike state and federal constitutions which only apply to state action, the *Fair Housing Act* captures the activities of private citizens, prohibiting discrimination in the sale, rental and financing of housing on the grounds of race, religion, and national origin, with sex, disability and family status being added in later decades. The Act is predicated on an acknowledgement that housing is a basic human need, and that if people are excluded from individual homes or buildings, and/or entire sections of communities or cities, they are unable to participate properly in civil society. Housing is as fundamental to a fully realised life as employment, education, voting, and access to public places. As Jeremy Waldron said in his famous article on homelessness, '[e]verything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it'.⁴⁹

For our purposes, the crucial attribute of the *Fair Housing Act* is that it applied not just to 'discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling', but also to 'the provision of services or facilities in connection

⁴⁵ *Tulk v Moxhay* (1848) 41 ER 1143. See McKenzie, *Privatopia* (n 35) 33–4, ch 3; James A Kushner, 'Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States' (1979) 22(4) *Howard Law Journal* 547; Sherry, *Strata Title Property Rights* (n 4) 60–5.

⁴⁶ A James Casner et al, *Cases and Text on Property* (Apsen Publishers, 5th ed, 2004) 799; Rigel C Oliveri, 'Is Acquisition Everything? Protecting the Rights of Occupants under the *Fair Housing Act*' (2008) 43(1) *Harvard Civil Rights-Civil Liberties Law Review* 1, 30.

⁴⁷ 334 US 1 (1948) ('*Shelley*').

⁴⁸ 42 USC §§ 3601–19 (2012).

⁴⁹ Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39(1) *University of California Los Angeles Law Review* 295, 296.

therewith'.⁵⁰ While there has been some debate about whether this phrase refers to services and facilities connected to the *initial* sale or lease of a dwelling,⁵¹ most courts accept that it simply refers to services and facilities connected to a dwelling. This is no doubt because sections of the United States housing market in the post-WWII period were increasingly dominated by condominiums and homeowner associations, and courts and legislatures were aware that they often included private facilities. Further, as Oliveri argues, the *Fair Housing Act* would have been a hollow victory if all it did was ensure the *acquisition* of housing was free from discrimination, but not the ownership and occupation of housing.⁵² As a result, there is a raft of case law that accepts that condominium and homeowner associations are covered by the Act because they are responsible for 'services and facilities' to which residents have access.⁵³

While the *Fair Housing Act* has had an enormous impact on discriminatory practices, the real estate industry, and even courts in the United States, retain a deep-seated conviction that regulation of residential land through privately created covenants is essential to maintain property values. It is worth briefly noting some of these practices so that readers can see the potential for discrimination inherent in privately regulated housing. Regulation typically relates to aesthetics and mandating architectural uniformity, but it also extends to resident behaviour and membership of the community. Homogeneity is frequently the covert or overt aim of covenants. By way of example, 'single family only' covenants are common, drilling down into household composition and residents' relationships to each other, a concept that no doubt seems astounding to most Australians. Although the federal *Fair Housing Act* does not cover marital status, many states' discrimination laws now do. However, illustrating the way in which judicial interpretation of discrimination statutes can limit their effectiveness, statutes outlawing marital discrimination have not necessarily prevented 'single family only' covenants prohibiting a woman living with a man to whom she is not legally married, with courts finding that such covenants do not pertain to marital status as they equally exclude friends and extended family.⁵⁴ In addition to being discriminatory to de facto couples, 'single family only' covenants are indirectly racially discriminatory, as African American and Hispanic families are more likely to live with extended family and in de facto relationships.⁵⁵ Residential-only covenants are sometimes successfully used to exclude group homes for the elderly or disabled, on the grounds that group homes run by private organisations are businesses.⁵⁶ I once attended a session at a

⁵⁰ 42 USC § 3604(b) (2012).

⁵¹ Oliveri (n 46).

⁵² Ibid 29.

⁵³ Ibid.

⁵⁴ *Maryland Commission on Human Relations v Greenbelt Homes Inc*, 475 A 2d 1192 (Md, 1984). Cf *Smith v Fair Employment and Housing Commission*, 913 P 2d 909 (Cal, 1996), in which the Court held that the appellant had breached a Californian statute prohibiting marital discrimination in housing by refusing to rent to an unmarried couple on the grounds that if she permitted them to have extramarital sex in her property, God would prevent her from meeting her dead husband in the afterlife.

⁵⁵ Gerald Korngold, 'Single Family Use Covenants: For Achieving a Balance between Traditional Family Life and Individual Autonomy' (1988) 22(3) *University of California Davis Law Review* 951; Wendy D Manning, 'Cohabitation and Child Wellbeing' (2015) 25(2) *The Future of Children* 51, 59–60; Rachel E Dunifon, Kathleen M Ziol-Guest and Kimberly Kopko 'Grandparent Coresidence and Family Well-Being: Implications for Research and Policy' (2014) 654(1) *The Annals of the American Academy of Political and Social Science* 110, 112.

⁵⁶ Group homes or aged care facilities are often run by the private sector in the United States, which aids in their characterisation as businesses: see Robert D Brussack, 'Group Homes,

conference of residential association lawyers, only slightly ironically entitled, ‘Keeping Out the Riff Raff’.

While remaining mindful of the limitations of discrimination statutes, it should be noted that they are frequently effective. For example, a New Jersey appeal court recently invalidated a rule of a condominium association designating male and female only hours for the common property pool.⁵⁷ The association argued that as it had a large number of Orthodox Jewish residents, it would have been discriminating against them if it did not provide single-sex swimming hours. The Court did not address the vexed question of whether segregated hours per se were discriminatory (although Fuentes J, in a separate, concurring judgment, noted that if the hours had been race segregated the Court would have no trouble deciding that they were discriminatory),⁵⁸ but rather concluded that the hours were discriminatory because they allocated far more time to men than women after work. If a woman had a nine to five job, she would have difficulty using the pool. While the condominium association maintained that the pool schedule was not discriminatory, it accepted that it fell within the *Fair Housing Act* as it provided ‘services and facilities’ associated with a dwelling.

The third important way that residential association activity has been challenged is via orthodox property law. The *Restatement (Third) of Property: Servitudes* (2000) (*Restatement*) clarifies traditional property rules that invalidated some servitudes. Like our rules on easements and freehold covenants, these rules are notoriously complex, obscuring the fact that their function has been to invalidate privately created, enduring burdens on freehold land that are socially or economically regressive.⁵⁹ The *Restatement* simplifies those rules, and amongst other things, invalidates covenants that are contrary to public policy. United States case law also stipulates that newly created rules of associations must be ‘reasonable’.⁶⁰ While this law is the source of much litigation in the United States, constituting a significant curb on association power, unfortunately, as yet it has limited equivalence in Australia and will not be discussed in detail here.⁶¹

The final limit on association power has been through attempts to argue the ‘state action’ doctrine in order to engage state and federal constitutions. *Shelley* did this by holding that court enforcement of covenants constituted state action, but as noted, the case has anomalously been limited to racially restrictive covenants. The alternative argument is that associations *themselves* are engaging in state action as they operate as quasi-governments. This allows applicants to challenge association activity that is not prohibited by the *Fair Housing Act*, but is prohibited by constitutions. The most

Families, and Meaning in the Law of Subdivision Covenants’ (1981) 16(1) *Georgia Law Review* 33; Thomas F Guernsey, ‘The Mentally Retarded and Private Restrictive Covenants’ (1984) 25(30) *William and Mary Law Review* 421.

⁵⁷ *Curto v A Country Condominium Association Inc*, 921 F 3d 405 (3rd Cir, 2019).

⁵⁸ *Ibid* 412.

⁵⁹ Sherry, *Strata Title Property Rights* (n 4).

⁶⁰ *Hidden Harbour Estates Inc v Norman*, 309 So 2d 180 (Fla Dist Ct App, 1975).

⁶¹ See Sherry, *Strata Title Property Rights* (n 4), the argument of which is that Australian state legislatures and courts have made a serious mistake in overlooking the fact that strata title by-laws are simply the statutorily authorised equivalent of positive and restrictive freehold covenants and, like freehold covenants, must be limited in their content by judicial oversight. Traditionally, private citizens have never had unlimited power to regulate freehold land, and they should not be given this power through strata Acts.

common challenges relate to free speech. While there have been no similar cases in Australia,⁶² the argument that a body corporate in an estate with 5,000 residents is analogous to a local council is viable. Further, the state action cases focus on the concept of publicly accessible private property, a concept that has been significant in Australian case law, as will be discussed below. For these reasons, the following description of United States case law is included.

Initially, supporters of residential associations were eager to characterise them as public ‘mini governments’. In 1976, Hyatt and Rhoads wrote that ‘upon analysis of the association’s functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government’.⁶³ They argued that garbage collection and park maintenance were equivalent to municipal services, levies equivalent to taxes, and private security guards equivalent to a police force. However, a decade later, homeowner association advocates were retreating from this stance because of the threat of constitutional limitations on their power.⁶⁴

Constitutional limits on the power of a private land-owning entity had been applied by the United States Supreme Court in *Marsh v Alabama* (‘*Marsh*’) in 1946.⁶⁵ The Court held that the refusal by a privately owned company town to grant Marsh, a Jehovah’s Witness, a licence to distribute religious leaflets and her subsequent charge of trespass by the State were a violation of her First and Fourteenth Amendment rights to free speech. The Supreme Court held that while the town’s pavements were private property, the more a property owner opened his or her property to the public, the more property rights had to be balanced against other rights such as freedom of religion and speech. If the State permitted the company to use its property as a town, the public had an identical interest in the community functioning with free speech as it would have if the town were owned by a municipality.

Half a century later, the authority of *Marsh* was used by homeowner association residents to challenge homeowner associations’ power to ban signs and the distribution of pamphlets. Bans are largely designed to prevent visual ‘pollution’ (similar to ‘no signage’ by-laws that are common in Australia), but the application of these rules to political signs and pamphlets, particularly in large-scale communities the size of suburbs, raised questions about conflict with free speech provisions in the United States’ and individual states’ constitutions. Bans also capture the display of flags,

⁶² However, it seems that the owners of Sanctuary Cove, Australia’s first and most iconic body corporate estate, recently banned the long-running community newsletter on the grounds that it was harming the estate’s reputation and property values: Greg Stolz, ‘No News Is Bad News for Estate’, *The Courier Mail* (Brisbane, 16 February 2019) 15.

⁶³ Wayne S Hyatt and James B Rhoads, ‘Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations’ (1976) 12(4) *Wake Forest Law Review* 915, 918.

⁶⁴ The latest edition of Hyatt’s textbook states that ‘common interest communities are almost never treated as state actors subject to the constitutional constraints placed on public governments’: Wayne S Hyatt and Susan F French, *Community Association Law: Cases and Materials on Common Interest Communities* (Carolina Academic Press, 2nd ed, 2008) 113.

⁶⁵ 326 US 501 (1946).

causing community outrage when people are instructed to remove the national flag; sentiment ran particularly high after September 11.⁶⁶

In *Committee for a Better Twin Rivers (CFBTR) v Twin Rivers Homeowners' Association (TRHA)* ('*Twin Rivers*'),⁶⁷ homeowners in a residential association with 10,000 residents, 20 full-time staff and 50 seasonal employees alleged that the Association rules, as well as its decisions on posting signs and access to a community room and newsletter, were violating their free speech and free association. The plaintiffs argued that as the Association effectively replaced the role of a municipality, it should be subject to the free speech and association clauses of the *New Jersey Constitution*, which extends to private actors in limited circumstances.⁶⁸ The leading case is *New Jersey v Schmid* ('*Schmid*'),⁶⁹ in which the defendant was charged with trespass after entering Princeton University's campus to distribute political pamphlets. The Court outlined a three-pronged test for the circumstances in which the State's free speech protections might be infringed by a private actor. The test considered the nature of the property, the extent of the public's access to it, and the purpose of the expression activity. The Court found that the primary purpose of the campus was education, that a public presence on campus was consistent with that purpose, and that the defendant's expression was consistent with the public and private uses of campus. *Schmid* was subsequently applied to shopping centres, which, while private property, are open to the public and frequently take the place of traditional, public town centres.⁷⁰

Despite the authority of *Marsh* and *Schmid*, the Court in *Twin Rivers* refused to apply constitutional restraints to the homeowner association, concluding that *Twin Rivers* was a private residential community, not expressly open to the public, and the plaintiffs' expressional activity was not unreasonably restricted.⁷¹ The Court noted that residents had contractually agreed to abide by the rules and regulations of the Association. Those rules were subject to the business judgment rule, legislative provisions on homeowner associations, and traditional principles of property law, but not constitutional protections.

More recently, the New Jersey Supreme Court declined to apply the reasoning in *Twin Rivers* in *Mazdabrook Commons Homeowner Association v Khan* ('*Mazdabrook*').⁷² Khan argued that his homeowner association had violated his right to free speech because its blanket ban on signs, other than 'For Sale' signs, prevented him from putting his political campaign signs in his own window. The Court noted the difficulty of applying the *Schmid* test – a test designed for publicly accessible private property – to a private residential community, because the property was not generally publicly accessible, and Khan was not a member of the public.⁷³

⁶⁶ See Joseph William Singer, 'How Property Norms Construct the Externalities of Ownership' in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010) 57.

⁶⁷ 929 A 2d 1060 (NJ, 2007) ('*Twin Rivers*').

⁶⁸ *New Jersey Constitution* art I §§ 6, 18.

⁶⁹ 423 A 2d 615 (NJ, 1980) ('*Schmid*').

⁷⁰ *New Jersey Coalition Against War in the Middle East v JMB Realty Corp*, 650 A 2d 757 (NJ, 1994).

⁷¹ *Twin Rivers*, 929 A 2d 1060, 1073 (NJ, 2007).

⁷² 46 A 3d 507 (NJ, 2012) ('*Mazdabrook*').

⁷³ *Ibid* 516, 518.

The Court found that while the homeowner association had a legitimate right to regulate the look of the development, promoting a uniform aesthetic to maintain property values,⁷⁴ this could not justify hampering the defendant's most basic right to speak on *his own property*. While the homeowner association had the right to adopt reasonable restrictions on speech, here, unlike *Twin Rivers*, there was a complete ban on all signs without written consent of the Board.

On balance, the homeowner association's right to maintain a uniform aesthetic was outweighed by the defendant's right to free political speech. The Court was mindful of the fact that, as hundreds of thousands of New Jersey residents lived in communities like Mazdabrook, the proliferation of homeowner associations with boilerplate restrictions on signs could have a very real effect on free speech.⁷⁵

The Court also held that the defendant had not waived his right to free speech by voluntarily buying into the homeowner association. They said:

Khan was not asked to waive his free speech rights; he was asked – by different rules in three documents – to waive the right to post signs before getting Board approval, without any idea about what standards would govern the approval process. That cannot constitute a knowing, intelligent, voluntary waiver of constitutional rights.⁷⁶

What are the lessons to be learned from the law in relation to private residential communities in the United States, vis-a-vis discrimination and civil rights? The first is to note that the power that private residential communities give to private citizens through bodies corporate is open to abuse. While Australia does not have the same history of segregation and pursuit of homogeneity in housing, there is still a risk that private citizens, acting in their own self-interest,⁷⁷ will behave in intentionally or inadvertently discriminatory ways. Second, the fact that people have 'voluntarily' purchased or rented a home in a community does not mean that they have voluntarily agreed to all of the privately created rules, which may not have been made clear,⁷⁸ may

⁷⁴ Ibid 518.

⁷⁵ Ibid 522.

⁷⁶ Ibid 521.

⁷⁷ The New South Wales Court of Appeal has held that '[t]he power of a proprietor to vote at general meetings of the body corporate is not fiduciary, and within limits it may be exercised by the proprietor for his or her own benefit': *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 52–3. However, the *Strata Schemes Management Act 2015* (NSW) s 37 stipulates that members of the strata committee (formerly the executive committee) must carry out their functions so far as practicable for the benefit of the owners corporation. In Queensland, the *Body Corporate and Community Management Act 1997* (Qld) sch 1A includes a code of conduct which requires voting committee members to act in the best interests of the body corporate. However, these provisions do not prevent ordinary members of the body corporate voting in their own interests; the legislation is designed for them to do exactly that.

⁷⁸ In Australia, by-laws must be registered to be enforceable and Torrens registers are publicly accessible. However, some by-laws state that owners and residents are bound by 'architectural guidelines' or rules in unregistered documents: see, eg, 'Jackson's Landing Community Management Statement: DP270215' (Management Statement, 15 December 2015) 10, by-law 1 <<https://jacksonslanding.net.au/wp-content/uploads/2019/05/31057-NSW-Image-Deposited-Plan-270215Management-Statement.pdf>>. These are used because they are easier to alter than registered by-laws, but that in turn makes them unpredictable, unknown and unclear. On ordinary Torrens principles, documents outside the Torrens register should not be binding: *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528; Sherry, *Strata Title Property Rights* (n 4) 151–2.

not have yet been decided or may not be socially, politically or economically justifiable. As a result, the concept of voluntary consent cannot legitimise all rules or decisions of private communities.⁷⁹ Third, because discrimination in housing was so endemic and entrenched in the United States, the *Fair Housing Act* was drafted to apply to a wide range of discrimination, including discrimination in relation to ‘services and facilities’ associated with the ongoing occupation of housing. This directly catches condominiums and homeowner associations. Fourth, attempting to capture private residential communities on the grounds that they are analogous to publicly accessible property is unlikely to be fruitful, because they are generally not publicly accessible and the people who are most affected by their decisions are not the public, but members of the community. As private property that gives collective owners power over all individual residents, private residential communities are sui generis.

IV AUSTRALIAN STRATA TITLE AND DISCRIMINATION LEGISLATION

Unlike the United States, Australia does not have a bill of rights, and with the exception of Victoria, the ACT and now Queensland, no state has general human rights legislation. The primary guarantee of equality comes from state and federal discrimination Acts. As a result, an analysis of Australian law will not require consideration of constitutional law or ‘state actors’, but it does still require consideration of the public/private divide. Discrimination legislation captures private actors, but as noted in Part II, only to the extent that their actions have some effect in the public sphere.

At the outset, it is important to note that all state strata Acts contain some recognition of the potentially harmful nature of private governance and have some anti-discrimination provisions embedded in them. First, all states have a prohibition on by-laws that restrict transfer, leasing and mortgaging of lots.⁸⁰ Although this provision is typically characterised as the mechanism which avoided the aspect of company title⁸¹ that made banks reluctant to fund their purchase, that is, the ability of boards of directors to veto the transfer of shares on a mortgage sale,⁸² the provision also prevents schemes

⁷⁹ There is extensive literature on the flaw of assuming that privately created rules in private residential communities are legitimate because they were allegedly consensually agreed. See Sherry, *Strata Title Property Rights* (n 4); Robert G Natelson, ‘Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association’ (1990) 51(1) *Ohio State Law Journal* 41; Carol M Rose, ‘Servitudes, Security, and Assent: Some Comments on Professors French and Reichman’ (1982) 55(6) *Southern California Law Review* 1403; Stewart E Sterk, ‘Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions’ (1985) 70(3) *Iowa Law Review* 615; Stewart E Sterk, ‘Foresight and the Law of Servitudes’ (1988) 73(5) *Cornell Law Review* 956; James L Winokur, ‘The Mixed Blessing of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity’ [1989] (1) *Wisconsin Law Review* 1; Uriel Reichman, ‘Toward a Unified Concept of Servitudes’ (1982) 55(6) *Southern California Law Review* 1177.

⁸⁰ See, eg, *Strata Schemes Management Act 2015* (NSW) s 139(2).

⁸¹ Company title was used for apartments prior to the introduction of strata Acts in the 1960s. In company title, a company owns the land (which includes the building) and people purchase a parcel of shares that entitles them to occupy a particular apartment. The company is managed by a board of directors.

⁸² The attraction of mortgages for banks is that they can quickly and easily recover the funds they have lent. Once default occurs and is not remedied, a mortgagee can take possession of land and sell it to the first highest bidder. The sale of a company title unit is not the transfer of land but the transfer of a bundle of shares, which typically requires the approval of the company’s board of directors. Any difficulties in securing approval could prevent the mortgagee selling to the

discriminating against purchasers in order to create communities of ‘people like us’. This is precisely what company title buildings (which, in a recurring theme, we also copied from the United States)⁸³ were sometimes doing when they sought to disapprove the transfer of shares to an ‘unacceptable’ purchaser or a lease to an ‘unacceptable’ tenant.

Second, some states have provisions that restrict the creation of by-laws that have a discriminatory impact on particular groups of people. Section 180(5) of the Queensland *Body Corporate and Community Management Act 1997* prohibits by-laws that discriminate between ‘types of occupiers’.⁸⁴ While the New South Wales *Community Land Management Act 1989* explicitly permits community management statements (the by-laws in body corporate estates) to restrict ‘occupancy under the scheme to persons of a particular description’,⁸⁵ it prohibits restrictions based on ‘race or creed, or on ethnic or socio-economic grouping’.⁸⁶ The restriction of occupancy to particular groups of people was included in the *Community Land Management Act 1989* so that developments could be ‘themed’ like some United States homeowner associations, but other than age-restricted retirement communities, themed communities do not seem to exist in Australia. This is most probably because it is not economical to restrict purchasers to limited pools of people. It is more desirable for developers to provide amenities, such as green utilities, or prayer or meditation rooms, that are attractive to particular groups of buyers.⁸⁷ Rather than vetting owners and residents, intentional communities⁸⁸ sometimes include ‘mission statements’ in their by-laws in the hope that people who do not support the aims of the community will self-select out. In what has to be one of the more poetic parts of the Torrens register, the management statement for Jindibah in Byron Shire begins with the statement ‘this community is being created with ecological sensitivity, and hopefully, the wisdom of the owls for a few people who share the same vision and objectives’.⁸⁹

first, highest bidder, leading to delay in recovery of the lent funds. See Sherry, ‘Land of the Free’ (n 36) 96.

⁸³ Sherry, *Strata Title Property Rights* (n 4) 19–20.

⁸⁴ See also *Strata Titles Act 1998* (Tas) s 91(3)(b).

⁸⁵ *Community Land Management Act 1989* (NSW) s 17(1)(a). The *Community Land Development Act 1989* (NSW) and the *Community Land Management Act 1989* (NSW) are the Acts that facilitate body corporate estates in New South Wales. There is no need to have separate legislation for high-rise buildings and body corporate estates, and most states do not.

⁸⁶ *Community Land Development Act 1989* (NSW) sch 3 cl 5(1)(c). This was expressly included to eliminate discriminatory by-laws: New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 1989, 12920 (Ian Causley).

⁸⁷ The question of religiously restricted communities occasionally flares up in the Australian media, but invariably, the land being sold is not, in fact, religiously restricted at all. See ‘New Development Targeted at Muslims in Melbourne Sparks Outrage’, *news.com.au* (online, 24 May 2016) <<https://www.news.com.au/entertainment/tv/current-affairs/new-development-targeted-at-muslims-in-melbourne-sparks-outrage/news-story/a5b8a611ae7dfcfff1f1785dcd17acb>>. Burbank, the developer now building new houses in Melton South, Melbourne, offers prayer rooms as part of their house and land packages, but the development is in no way restricted to Muslims. See video 7: Burbank, ‘Testimonials: What Makes Our Customers Smile?’, *Burbank* (Web Page, September 2018) <<https://www.burbank.com.au/victoria/burbank-testimonials>>.

⁸⁸ Intentional communities are communities in which people manage land and live by conscious, agreed values. They include religious communities, eco-communities and communes.

⁸⁹ ‘Jindibah Management Statement: DP286220’ (Management Statement, 22 April 2009) (copy on file with author). ‘Jindibah’ means both wisdom and tawny frogmouth in a local Aboriginal language.

In addition to limitations on by-laws that seem to be aimed specifically at discrimination, some states have generic limitations on by-laws, invalidating those that are ‘oppressive or unreasonable’,⁹⁰ ‘harsh, unconscionable or oppressive’⁹¹ or ‘adversely [affect] the health, welfare or safety of any person’.⁹² These provisions may effectively prevent discrimination. For example, by-laws banning any additions to doors or balconies can prohibit religious symbols such as a mezuzah or sukkah, arguably constituting religious discrimination.⁹³ These by-laws could be struck out as unreasonable, harsh, unconscionable or oppressive.

Finally, all states’ strata legislation contains a prohibition on by-laws that restrict guide dogs.⁹⁴ The very existence of these provisions highlights the private nature of strata schemes, and the potential conclusion that discrimination law does not apply to strata scheme land or the activities of a body corporate. It is not illegal to refuse the entry of a guide dog into your own home, but it is illegal to refuse a guide dog entry into a public place.⁹⁵ If strata schemes were public spaces, a special provision in the legislation would be unnecessary. Further, if strata schemes were intended to be captured by discrimination legislation some other way, for example as providers of ‘goods and services’ (discussed below), these provisions would also be unnecessary. The prohibition on by-laws that restrict guide dogs is perhaps the clearest indication that the legislature assumed that discrimination legislation did not apply to strata schemes. However, the prohibition also highlights how untenable this position is.

The best illustration of this unacceptable state of the law is the gap between the traditional term ‘guide dog’ and the more contemporary term ‘assistance animal’. While all state strata Acts prohibit by-laws that restrict guide dogs, a number have been updated and now use the more inclusive term assistance animal.⁹⁶ Although there are problems with the way the new provisions work, they are a crucial reform.⁹⁷ Assistance

⁹⁰ *Body Corporate and Community Management Act 1997* (Qld) s 180(7).

⁹¹ *Strata Schemes Management Act 2015* (NSW) s 139(1).

⁹² *Strata Titles Act 1998* (Tas) s 91(3)(c).

⁹³ A mezuzah is parchment with verses from the Torah contained in a decorative case and attached to a doorway. A mezuzah banned by a condominium rule was the subject of the litigation in *Bloch v Frischholz*, 587 F 3d 771 (7th Cir, 2009) discussed in Sherry, *Strata Title Property Rights* (n 4) 59. A sukkah is a temporary hut erected outside during the week of the Jewish festival of sukkah. Sukkah on condominium balconies were the subject of the Canadian Supreme Court decision in *Syndicat Northcrest v Amselem* [2004] 2 SCR 551.

⁹⁴ See, eg, *Strata Titles Act 1985* (WA) s 42(15).

⁹⁵ See, eg, *Disability Discrimination Act 1992* (Cth) ss 9, 23; *Companion Animals Act 1998* (NSW) s 60; *Domestic Animals Act 1994* (Vic) s 7(4).

⁹⁶ For example, the fourth generation NSW legislation, the *Strata Schemes Management Act 2015* (NSW) s 139(5) now uses the term ‘assistance animal’, as defined by the *Disability Discrimination Act* (Cth) s 9(2), in contrast to the *Strata Schemes Management Act 1996* (NSW) s 49(4) which only referred to guide and hearing dogs.

⁹⁷ *Strata Schemes Management Act 2015* (NSW) s 139(6) states that a by-law may require a person to produce evidence that an assistance animal is an assistance animal within the *Disability Discrimination Act 1992* (Cth) s 9. This is putting people in the invidious position of having to provide their neighbours with very private medical information, including information about mental health. I am regularly contacted by people who are distressed by this requirement. The legislation also gives lay people power to make a decision about an assistance animal when those lay people often have limited understanding of the law, in particular, the fact the legislation does not require an assistance animal to be a dog, any particular breed of dog or to be professionally trained. This is part of a wider problem that people have establishing that their animals are assistance animals, affecting people’s access to public places and transport. See ‘Calls to Improve Regulations for Assistance Animals’, *Australian Human Rights Commission*

animals help people with a wide range of medical issues including diabetes, epilepsy, schizophrenia, depression and autism.⁹⁸ Assistance animals can be particularly important for the elderly.⁹⁹

The absence of a prohibition on by-laws that restricted assistance animals in earlier strata Acts had a very real effect, as the case of *Thornton & Farnham v Owners SP 30653 (Strata & Community Schemes)* ('*Thornton*') demonstrates.¹⁰⁰ The case upheld the exclusion of an alleged assistance animal from a strata scheme on the grounds that the scheme's power to ban all animals was only limited by a legislative prohibition relating to guide and hearing dogs. The dog was conceded to be neither a guide nor hearing dog, and consequently the provision of the strata legislation that was designed to prevent discrimination was useless.

That then brings us to the question of whether strata schemes, in managing their own property and community, could fall within the ambit of existing discrimination Acts. It seems unlikely that any state or federal legislature has addressed this question directly or even been aware its existence. In its detailed and well-reasoned 1999 review of the *Anti-Discrimination Act 1977*, the NSWLRC dealt with strata schemes, but only to confirm that a strata lot is an interest in land and that if the Act were extended to cover the disposition of land, an apartment sale would be captured.¹⁰¹ There is no indication that the Commission considered the possibility that, in managing a scheme, a body corporate could or should be bound by the Act.

Discrimination legislation does cover both land and accommodation, but coverage is prima facie limited to people *disposing* of land¹⁰² and people *providing* accommodation.¹⁰³ A body corporate does not dispose of interests in land¹⁰⁴ or provide accommodation.

(Web Page, 17 February 2016) <<https://www.humanrights.gov.au/news/stories/calls-improve-regulations-assistance-animals>>; Paul Harpur, 'Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?' (2010) 29(1) *University of Tasmania Law Review* 49. However, the problem takes on an additional dimension in strata schemes because the space in question is the person's home, and the people empowered to make a decision are not strangers but their neighbours, with whom they have constant contact.

⁹⁸ Harpur (n 97) 51–4.

⁹⁹ Paul Harpur and Nancy A Pachana, 'My Animal, My Support, and My New Home in a Retirement Village: Disability Discrimination, Assistance Animals and Old Age' (2017) 11 *Elder Law Review* [ii]; *Trustees of Catholic Aged Care Sydney v Murphy* [2017] NSWCATCD 46. [2010] NSWCTTT 511 ('*Thornton*').

¹⁰⁰ New South Wales Law Reform Commission (n 19) [4.282].

¹⁰¹ See, eg, *Racial Discrimination Act 1975* (Cth) s 12(1)(a); *Sex Discrimination Act 1984* (Cth) s 24; *Disability Discrimination Act 1992* (Cth) s 26; *Age Discrimination Act 2004* (Cth) s 30. State provisions include *Anti-Discrimination Act 1991* (Qld) s 77 and *Equal Opportunity Act 2010* (Vic) s 50.

¹⁰² See, eg, *Racial Discrimination Act 1975* (Cth) s 12(1)(a); *Sex Discrimination Act 1984* (Cth) s 23; *Disability Discrimination Act 1992* (Cth) s 25(1); *Age Discrimination Act 2004* (Cth) s 29. State provisions include *Anti-Discrimination Act 1991* (Qld) div 8 and *Equal Opportunity Act 2020* (Vic) s 52.

¹⁰³ Although Queensland bodies corporate have sought exemptions from state prohibitions on age discrimination in disposition of interests in land so that they can create by-laws limiting communities to over-55s. Successful applications include *Caloundra Gardens Village Body Corporate Committee* [2012] QCAT 98; *J & D Richard Developments Pty Ltd* [2005] QADT 13; *Palmpoint Pty Ltd* [2006] QADT 12; *Burleigh Town Village Pty Ltd* [2011] QCAT 646. Unsuccessful applications include *Body Corporate for Village Green (Caloundra)* [2015]

While the provision on ‘land, housing and other accommodation’ in section 12 of the *Racial Discrimination Act 1975* (Cth), the first provision of this kind, seems to take the United States *Fair Housing Act* as its guide by attempting to cover a range of discriminatory practices, the focus is almost exclusively on disposition, covering a failure to dispose, a refusal to dispose or a disposal on less favourable terms. Section 12(1)(c) extends to post-acquisition discrimination by making it unlawful to ‘treat a ... person who ... has acquired such an estate or interest or such accommodation less favourably than other persons in the same circumstances’. In theory this could apply to a body corporate. However, there are no cases that have tested this question.

Unlike the *Racial Discrimination Act 1975* (Cth), which groups land and accommodation together (the granting of a lease being the disposition of an interest in land), most federal and state Acts have separate sections for land and accommodation. This is presumably so that accommodation provisions capture not just leases, but also licences, which are not interests in land. While the accommodation provisions also focus on the *granting* of rights, they often extend to denying or limiting another person’s access to a ‘benefit’ associated with accommodation.¹⁰⁵ While on its face ‘benefit’ could refer to the activities of a body corporate managing the scheme and common property, case law has held that it does not. In *Hulena v Owners Corporation Strata Plan 13672* (‘*Hulena*’),¹⁰⁶ the NSW Anti-Discrimination Tribunal accepted that for conduct to be a denial of a benefit associated with accommodation ‘it must arise in circumstances where the respondent is acting as either a principal or agent in the provision of accommodation’.¹⁰⁷ The Queensland Anti-Discrimination Tribunal has held that while common property falls within the definition of ‘accommodation’ under the Queensland *Anti-Discrimination Act 1991*, it does not constitute a ‘benefit’.¹⁰⁸

The difficulty with both federal and state legislation is that, unlike the United States *Fair Housing Act*, prohibitions on discrimination in land and housing contain no reference to associated ‘services and facilities’. This is no doubt because at the time Australian discrimination legislation was drafted, housing did not typically include services and facilities.

Most housing was freestanding with public, not private amenities, for example, municipal parks, pools and sporting fields. Strata schemes were built in restricted sections of our cities, and were small, three storey walk-ups with limited common property. The creation of strata schemes did not give bodies corporate authority over large areas of land, nor authority over large groups of people. Large-scale strata schemes and body corporate estates, with extensive facilities and services modelled on United States homeowner associations, only started to be constructed in the mid to late

QCAT 101; *Savannah FNQ Developments Pty Ltd* [2016] QCAT 141. See also *Gembrook Views Estate Pty Ltd v Cardinia SC (Red Dot)* [2017] VCAT 604 which arose as a result of the surprising fact that the Victorian *Equal Opportunity Act 2010* was enacted without an express exemption for retirement villages from the age provisions.

¹⁰⁵ See, eg, *Sex Discrimination Act 1984* (Cth) s 23(2)(a); *Disability Discrimination Act 1992* (Cth) s 25(2)(a); *Age Discrimination Act 2004* (Cth) s 29(2)(a). State provisions include *Anti-Discrimination Act 1991* (Qld) s 83(b) and *Equal Opportunity Act 2010* (Vic) s 53(b).

¹⁰⁶ [2009] NSWADT 119 (‘*Hulena*’).

¹⁰⁷ *Ibid* [32].

¹⁰⁸ *C v A* [2005] QADT 14, [50] (Member Savage).

1980s,¹⁰⁹ and were not common until the turn of the 21st century. As a result, legislatures drafting in earlier decades did not perceive bodies corporate as private actors who could have detrimental effects in the public sphere. Further, while we have a clear history of racial discrimination in relation to land,¹¹⁰ it does not include the real estate, finance and development industries assiduously pursuing segregation as a matter of policy.¹¹¹ As a result, prohibitions on discrimination in relation to land and accommodation in Australia are much briefer than those in the United States.

Recent attempts to apply discrimination legislation to bodies corporate have not focused on sections relating to land and accommodation, but rather on the provision of ‘goods and services’. One of the difficulties with federal and state legislation prohibiting discrimination in this area is that only some legislation makes explicit reference to goods and services being provided to the public or a section thereof. For example, section 13 of the *Racial Discrimination Act 1975* (Cth) prohibits discrimination in relation to goods and services supplied ‘to the public or to any section of the public’. In contrast, most other federal and state Acts omit references to ‘the public’; however, they do define services to include services relating to finance, travel, transport, trades, professions and government, all of which are typically provided to the public. Legislation that includes ‘access to premises’ within the definition of ‘services’ specifies that premises are those accessible by the public.¹¹²

It is possible that the omission of the word ‘public’ is immaterial and that it goes without saying that only goods and services which are publicly supplied are covered. In its analysis of disparate provisions on good and services, the NSWLRC made no comment on the absence of the word ‘public’ in many state and federal Acts.¹¹³ If I host regular gala parties, supplying my guests with food and beverages, my activities do not constitute the ‘provision of goods and services’. This is consistent with the theoretical basis of the common law rules on service, discussed in Part II. Further, clubs and associations routinely provide services to members, but they typically only fall within discrimination legislation when they are considered to be operating in the public sphere.¹¹⁴ This is determined not by their provision of services, but by their being registered, holding a liquor licence and/or constituting a sufficient size.¹¹⁵

The question of whether goods and services are limited to those provided to the public or a section thereof is significant for bodies corporate because they do not provide

¹⁰⁹ Sanctuary Cove, Australia’s first resort-style, body corporate estate, needed its own Act of Parliament to be built: *Sanctuary Cove Resort Act 1985* (Qld).

¹¹⁰ The most obvious being the persistent denial of native title and the ultimate determination that if native title existed, it could be extinguished by the grants of land to other people: *Mabo v Queensland [No 2]* (1992) 175 CLR 1. The racially discriminatory nature of common law extinguishment is highlighted by the fact that the passage of the *Racial Discrimination Act 1975* (Cth) potentially invalidated land grants made after its enactment. Those grants were then validated by the *Native Title Act 1993* (Cth).

¹¹¹ See McKenzie, *Privatopia* (n 35) ch 3; Kushner (n 45).

¹¹² See, eg, *Anti-Discrimination Act 1977* (NSW) s 4 (definition of ‘services’) and *Anti-Discrimination Act 1991* (Qld) sch 1 (definition of ‘services’).

¹¹³ New South Wales Law Reform Commission (n 19) [4.139]–[4.150].

¹¹⁴ *Ibid* [4.228].

¹¹⁵ See, eg, *Equal Opportunity Act 2010* (Vic) s 4 which defines ‘club’ to be an association of more than 30 persons and which holds a liquor licence; *Anti-Discrimination Act 1991* (Qld) sch 1, defines ‘club’ as an association whose purpose is to make a profit; the *Anti-Discrimination Act 1977* (NSW) only applies to registered clubs.

services to the public at all. They provide services to owners and residents of the scheme, much like clubs and associations only provide services to members. As a result, it is possible that a body corporate managing a strata scheme is just private property owners looking after their own land; it is not a 'service'. This is what the Tribunal held in the assistance animal case, *Thornton*.¹¹⁶ The argument is most convincing in relation to small strata schemes, such as a two-lot duplex. When the two owners decide to repair the driveway, are they providing goods and services to themselves or are they just repairing their own land? The latter seems most likely. However, imagine a body corporate in a high-rise tower or a large estate with thousands of residents, similar to the Twin Rivers development considered above. When a body corporate in a large community makes a decision in relation to the use of lot and common property or the maintenance or retrofitting of the front entry or road, the greater disconnection between the body corporate and any individual member makes it more tenable to characterise the body corporate activities as the provision of goods and services.

There is a small but growing body of case law that has found that bodies corporate do provide goods and services and are thus captured by discrimination Acts. However, the case law is limited to specific aspects of body corporate activities, and there are material differences between state authorities.

The leading Queensland authority is *C v A*, in which the applicant, who had an incurable condition that caused her to have constant blurred vision, relied on an assistance dog and used a motorised wheelchair and portable respirator.¹¹⁷ The strata scheme in question was a large 'resort-style' scheme at South Bank in Brisbane, and built pursuant to the *South Bank Corporation Act 1989* (Qld).¹¹⁸ C could not enter the building, pool and other recreational areas without assistance, because of the building's electronic key system. However, she would have been able to open all doors on her own with a 'proximity device'. She alleged that the failure of the body corporate to alter doors so that they would be responsive to such a device constituted indirect discrimination.

On the question of whether a body corporate was captured by the *Anti-Discrimination Act 1991* (Qld), the Tribunal Member noted at [17] that the definition of 'services' in the Act was 'not a happy one'. However, the Act's dictionary defined services to include 'recreation', and the case concerned access to recreational facilities, including the pool. The Member held that

the essential function of the body corporate 'A' is to provide services to the residents of the complex including relevantly, maintaining or improving the access ways to facilities on the common property and access to and from individual apartments within the building to those facilities. That is what 'A' has in fact done here. It has altered the access ways on the common property during the pendency of (and prior to) this complaint, but

¹¹⁶ [2010] NSWCTTT 511, [10] (Member O'Keefe).

¹¹⁷ [2005] QADT 14.

¹¹⁸ Like a number of large strata developments in state significant waterfront areas in Australia, the South Bank development is leasehold strata. The result is that all owners are technically tenants, having purchased long-term leases rather than the freehold title, which is retained by the state government. The fact that owners are tenants has no significance in this case as leasehold strata operates in the same way as freehold strata with individually owned lot property, collectively owned common property and a body corporate managing the scheme.

not in a way which facilitates entry by C to the recreational areas of the building from the street frontage or from her apartment.¹¹⁹

The Tribunal rejected the body corporate's argument that by looking after its own property it was not providing a 'service'.

The Member also dismissed the respondent's claim that the case fell within the statutory exception in section 92 of the Act,¹²⁰ which permits discrimination in relation to impairment if the supply of special services would impose unjustifiable hardship on the alleged discriminator. The Member found that the cost of the proximity device was a few thousand dollars, the disruption from its installation would only last one day and that this would not cause unjustifiable hardship to the 'body corporate of a large inner city apartment block, the average price of units in which exceeds \$750,000'.¹²¹

While finding in favour of the applicant, the decision is arguably limited to the provision of access to and from common property facilities in a large scheme that included extensive recreational facilities. On the more general question of whether a body corporate was captured by discrimination legislation when regulating its common property, the Member held at [30] that

I do not think that control of the behaviour of users of the pool area, another obligation of 'A' ... can be regarded as providing recreational services by 'A'. Mere possession without more cannot constitute the provision of a service and no possible service otherwise identified falls within the provisions of the Act.

So, if the body corporate had restricted swimming hours for children to five hours a week,¹²² created sex-segregated swimming hours or banned people displaying flags, including the gay pride, rainbow flag in their windows or on balconies,¹²³ this regulation of lot and common property would not constitute a service that fell within the Act.

The leading NSW case is *Hulena*,¹²⁴ a decision of the Administrative Decisions Tribunal ('ADT'), which was confirmed on appeal.¹²⁵ Built in the 1970s, the scheme did not include extensive facilities, but it was relatively large.

Ms Hulena had multiple sclerosis and could not access her apartment via the ordinary access routes. She argued that her body corporate had breached section 49M(1)(b) of the *Anti-Discrimination Act 1977* (NSW), which renders it unlawful for a person who

¹¹⁹ C v A [2005] QADT 14, [29] (Member Savage).

¹²⁰ Ibid [55]–[56].

¹²¹ Ibid [55].

¹²² See generally Sue Williams, 'Children Banned from Using Erskineville Apartment Building's Pool, Residents Vow to Fight', *Domain* (Web Page, 2 June 2019) <<https://www.domain.com.au/news/children-banned-from-using-erskineville-apartment-buildings-pool-residents-vow-to-fight-844278/>>.

¹²³ *Comensoli v Passas* [2019] NSWCATAD 155 held that the respondent was guilty of homosexual vilification after she yelled at her strata scheme neighbour in relation to his display of the rainbow flag on his balcony after the successful same sex marriage postal vote in 2017. However, although the respondent alleged that flags and other items were prohibited on balconies, the question of whether a body corporate could ban the display of the rainbow flag was not considered in the case.

¹²⁴ [2009] NSWADT 119.

¹²⁵ *Hulena v Owner's Corporation Strata Plan 13672* [2010] NSWADTAP 27.

provides goods or services to discriminate against a person on the ground of disability. Ms Hulena alleged that her body corporate had indirectly discriminated against her.¹²⁶

The NSW Act provided a definition of ‘services’, which included ‘access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use’.¹²⁷ The Tribunal held that this did not apply to residential apartments which were not generally open to the public.¹²⁸ However, the statutory definition of services was non-exhaustive, and the Tribunal noted that beneficial legislation like discrimination Acts should be given a liberal interpretation.¹²⁹ As a result, it was open to Ms Hulena to argue that the body corporate provided services outside those listed in the statute.

Ms Hulena alleged that the body corporate provided three services. The first was *the provision* of entrances and exits to and from the common property. The Tribunal considered that this went beyond mere maintenance and repair of the common property, and contemplated changes to the common property. The Tribunal considered the body corporate’s statutory obligation to maintain and repair common property which was, at the time, contained in sections 61 and 62 of the *Strata Schemes Management Act 1996* (NSW),¹³⁰ as well as the power to make additions to common property pursuant to section 65A. The Tribunal found that while installing a lift would not fall within the statutory obligation to maintain and repair common property,¹³¹ adjusting doors and installing handrails might. In any event, whether there was a statutory obligation to make these changes or not, the body corporate *had* provided ‘accessible routes to individual apartments from the common property, namely by way of the provision of a handrail to facilitate access along pedestrian access route 2 and attempts to provide an appropriate door closer to Ms Hulena’s apartment’ and thus the provision of ‘accessible entrances and exits from the common property to individual apartments within the complex’ was a service that the body corporate provided.¹³²

The second service that Ms Hulena alleged was *the maintenance and upkeep* of common property. While the Tribunal accepted that this was a service that the body corporate provided, they found that

before there can be a finding of discrimination by the respondent in relation to the provision of services, the relevant service must be identified with sufficient precision to relate them to the facts of the case and the issues which arise for determination. ... the concepts of maintenance and upkeep are concerned with the continuation of a specified state including by repair, and do not connote alterations to the common property to accommodate particular needs in relation to access.¹³³

¹²⁶ *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b).

¹²⁷ *Ibid* s 4(1) (definition of ‘services’ para (f)).

¹²⁸ *Hulena* [2009] NSWADT 119, [65]–[66] (Members Pritchard, Hayes and Schembri).

¹²⁹ *Ibid* [37], [55].

¹³⁰ Unlike non-strata properties, whose owners can allow them to fall into disrepair, strata properties benefit from a statutory obligation imposed on bodies corporate to repair and maintain common property. This provision exists in all state Acts.

¹³¹ The question of what constitutes maintenance and repair of common property, as opposed to replacement or upgrading common property is a difficult question in strata law generally. See, eg, *Thoo v Owners Strata Plan No 50276* [2011] NSWSC 657; *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.

¹³² *Hulena* [2009] NSWADT 119, [52]–[53] (Members Pritchard, Hayes and Schembri).

¹³³ *Ibid* [54]–[55].

The Tribunal made a similar finding in relation to the third service Ms Hulena alleged, that is *the maintenance and upkeep* of entrances and exits from the common property. This service lacked sufficient specificity to constitute a service that had been discriminatorily provided.¹³⁴

The Tribunal then considered whether the body corporate had ‘imposed a requirement’ on Ms Hulena that she use particular pedestrian access routes, contrary to section 49B(1)(b).¹³⁵ Applying the High Court decision in *New South Wales v Amery* (‘*Amery*’),¹³⁶ the Tribunal found that

the pedestrian access requirement was not imposed by a decision or practice of the body corporate which owns the common property of the apartment complex. Rather, it is a feature or incident of the design of a building which was erected prior to the adoption of minimum design requirements to enable access for people with disabilities, and which are contained in Australian Standards which do not apply retrospectively.¹³⁷

While this finding was fatal to Ms Hulena’s case, in the event it was incorrect in this finding, the Tribunal went on to deal with the other elements of the applicant’s argument. It held that if the body corporate had imposed a requirement on Ms Hulena to use a particular pedestrian access, though she could not do so as a result of her disability, that this requirement would be unreasonable in light of an option to modify three doors for the cost of approximately ‘\$16,247 plus \$3,000 for power supply and ongoing maintenance of \$990 per annum’.¹³⁸ The Tribunal found that the finances of the scheme were healthy and thus the costs would not impose an inappropriate burden on the body corporate. The Tribunal also found that the body corporate did not fall within the ‘unjustifiable hardship’ exception in section 49M(2) of the Act.¹³⁹

Having been unsuccessful in a key part of her case, Ms Hulena appealed the finding that the body corporate had not ‘imposed a requirement’ on her to use the existing pedestrian access. One of the questions on appeal was whether the Tribunal had correctly understood and/or was bound by the High Court’s decision in *Amery*. The Appeal Panel held that *Amery* did not

say that the alleged perpetrator must ‘impose’ the requirement or condition by an overt or express act or practice. Rather, the inference that can be drawn from the majority’s

¹³⁴ Ibid [56].

¹³⁵ *Anti-Discrimination Act 1977* (NSW) s 49B(1)(b) defines indirect discrimination in relation to disability to include requiring ‘the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability, or who do not have a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply’.

¹³⁶ (2006) 230 CLR 174 (‘*Amery*’). This case concerned the question of whether the New South Wales Department of Education had indirectly discriminated against female teachers because the highest point on the pay scale for casual teachers, who were more likely to be female, was five points below the highest point on the pay scale for permanent teachers.

¹³⁷ *Hulena* [2009] NSWADT 119, [74] (Members Pritchard, Hayes and Schembri).

¹³⁸ Ibid [103].

¹³⁹ Ibid [115]–[124].

decision was that the requirement or condition must be causally linked to the alleged perpetrator by some decision or practice made or adopted by it.¹⁴⁰

The Appeal Panel held that the pedestrian access requirement was not a result of compliance with any statute or regulation or from any other externally imposed source. The body corporate provided the services of creating accessible entrances and exits from individual apartments within the complex, and thus, '[i]f the body corporate has provide[d] that service then who, but for the body corporate, has required Ms Hulena to access her apartment via those entrances and exits'.¹⁴¹ Finally, they held that

construction of a building that met design specifications at the time of construction does not remove from the body corporate the ongoing responsibility of maintaining and repairing the common areas in accordance with current anti-discrimination legislation. If the body corporate provides the service of providing accessible entrances and exits from individual apartments within the complex, it must do so in accordance with legislation in force from time to time which includes compliance with the *AD Act*.¹⁴²

As the original Tribunal had found that all other elements of Ms Hulena's claim had been made out, the Appeal Panel found that her claim of indirect discrimination had been substantiated.

One of the key difficulties with the *Hulena* decisions is that they turn on the body corporate's own decision to partially retrofit entrances and exits for disability access. Like *C v A*, the decisions focus on the *provision* of accessible entrances and access ways. None of the cases make a general finding that in *managing* a strata scheme and its common property, a body corporate provides goods and services.

There are a small number of other cases that have found that a body corporate provides goods and services,¹⁴³ but the most significant is the recent decision of the Victorian Supreme Court in *Black*.¹⁴⁴ The respondent had disabilities that affected her mobility and she used a wheelchair or a scooter. The applicants were the bodies corporate responsible for the main entry to the building, and the doors to the car park, respectively. As a lot owner, Ms Black was a member of both applicants. She requested that they make modifications to the common property to accommodate her disability, but the applicants refused. The Victorian Civil and Administrative Tribunal ('VCAT') had found that section 44 of the *Equal Opportunity Act 2010* (Vic) ('*Equal Opportunity Act*'), which related to the provision of goods and services, applied to the applicant bodies corporate. The applicants appealed, arguing that they did not provide goods and

¹⁴⁰ *Hulena v Owner's Corporation Strata Plan 13672* [2010] NSWADTAP 27, [22] (Magistrate Hennessy, Members Furness and Antonios).

¹⁴¹ *Ibid* [23].

¹⁴² *Ibid*.

¹⁴³ In *Sutherland v Tallong Park Association Inc* [2006] NSWADT 163, [30], [48], the Tribunal applied the reasoning in *C v A* [2005] QADT 14 to hold that a residential incorporated association that had functions 'akin to a body corporate' provided 'services' in the form of maintenance and access to 'recreational, sporting, and leisure facilities on the common areas'. In *Ondrich v Kookaburra Park Eco-Village* (2009) 227 FLR 83, Burnett FM held at 112 [157], 116 [186] that a body corporate provided 'services' for the purposes of the *Disability Discrimination Act 1992* (Cth), but that the evidence did not establish that the dog in question, Punta, had been trained to alleviate her disability in accordance with s 9(1)(f) of the Act.

¹⁴⁴ (2018) 56 VR 1.

services and that section 56 of the *Equal Opportunity Act* was the only provision that could require a body corporate to make alterations to common property.

Section 56 of the *Equal Opportunity Act* is an innovative provision that allows an owner or an occupier of a strata lot who has a disability to make reasonable alterations to the common property at their own expense, so long as the alterations do not adversely affect another lot owner or the body corporate, and the person agrees to restore the common property to its original state before vacating their lot. This provision addresses a problem that is not uncommon in strata schemes, that is, lot owners asking to retrofit common property *at their own expense*, only to be refused permission to do so by the body corporate.¹⁴⁵

The sole question on appeal was whether the bodies corporate provided services within section 44 of the *Equal Opportunity Act*. The Victorian Equal Opportunity and Human Rights Commission was granted leave to appear as amicus curiae in the case.

In a detailed application of the rules of statutory construction, Richards J concluded that section 56 of the *Equal Opportunity Act* did not create any reason to read down sections 44 and 45.¹⁴⁶ All three sections could operate.

On the substantive question of whether a body corporate provides services, her Honour referred to the definition of ‘services’ in the Act, which included ‘access to and use of any place that members of the public are permitted to enter’.¹⁴⁷ The applicants argued that services did not extend to the acts or omissions of a body corporate in respect of common property because it is not public space. They argued that the *Equal Opportunity Act* ‘regulates discrimination in specified areas of public life, and that the public/private distinction is reflected in the definition of “services” that expressly includes “access to and use of any place that members of the public are permitted to enter”’.¹⁴⁸

Ms Black argued that ‘services’ included the activities of a body corporate in relation to common property, whether or not it is accessible by the public, and that in any event, discrimination legislation extends to elements of private life such as the disposal of land.¹⁴⁹ The Commission went further and argued that because ‘services’ include places the public can enter, and common property ‘can include areas that the public is permitted to enter – such as driveways, stairs, paths, passages, lifts and lobbies’, the access and use of common property falls within the specific definition of ‘services’ in

¹⁴⁵ By way of example, parents have asked permission to install security nets on their balconies to protect children from the very real danger of falling metres on to concrete below, only to be refused permission by the body corporate. This is despite the fact that parents are not asking the body corporate to bear the expense. Balconies are invariably common property, which is why body corporate consent is needed. See Kelsey Munro, ‘Parents Denied Safety Nets to Protect Children in Apartments’, *Domain* (online, 24 January 2012) <<http://smh.domain.com.au/real-estate-news/parents-denied-safety-nets-to-protect-children-in-apartments-20120123-1qe3r.html>>. See Cathy Sherry, ‘Kids Can’t Fly: The Legal Issues in Children’s Falls from High-Rise Buildings’ (2012) 2(1) *Property Law Review* 22.

¹⁴⁶ *Black* (2018) VR 1, 12–22 [34]–[72] (Richards J).

¹⁴⁷ *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of ‘services’).

¹⁴⁸ *Black* (2018) 56 VR 1, 22 [74] (Richards J).

¹⁴⁹ *Ibid* 22–3 [75].

section 4(a).¹⁵⁰ Because the definition is inclusive, access to and use of *all* common property is a service to owners and occupiers.

Her Honour agreed with the Commission, stating that

there is no clear public/private demarcation in the [*Equal Opportunity*] Act. Many intrinsically private areas of activity, such as employment, partnerships, and provision of accommodation, are the subject of the prohibitions against discrimination and positive obligations to make reasonable adjustments.¹⁵¹

On the alleged public nature of strata schemes, her Honour said that

[i]t is clear, as the Commission submitted, that common property of an owners corporation can include areas that members of the public are permitted to enter. ... Ms Black seeks modification of parts of the building – such as the main entry door to the building – that may well be in areas that the public is permitted to enter. If that is so, access to and use of those areas would clearly fall within para (a) of the definition of ‘services’ in the [*Equal Opportunity*] Act.¹⁵²

The ratio of the case can be found at [78] where her Honour said, ‘I find no error in VCAT’s conclusion that the applicants provide “services” in respect of common property, specifically managing, administering, repairing and maintaining it’.¹⁵³

While a finding that the body corporate had to retrofit the common property for disability access is welcome, unfortunately the reasoning in *Black* is flawed in two respects. First, there *is* a public/private demarcation in discrimination legislation, with legislation operating in the public sphere. With all due respect to Richards J, the acts of employing people and providing accommodation are not private acts; they might be performed by private citizens, but they are public acts because they affect others’ ability to participate in civil society.

Second, by accepting the argument of the Commission that common property ‘can include areas that the public is permitted to enter – such as driveways, stairs, paths, passages, lifts and lobbies’,¹⁵⁴ the Court seems to have misunderstood the nature of most common property. The scheme in question did have publicly accessible space. It was a large, mixed-use, contemporary scheme that included a supermarket with customer parking and other commercial premises, all of which were irrefutably publicly accessible. But, this would not give the public any right to be in the apartment lobbies, lifts, stairs or passages; they remained private property accessible only by express or implied invitation. Further, if the existence of some publicly accessible property was decisive, what about the vast majority of strata schemes that contain no publicly accessible property? Relying on the authority of *Black*, other courts and tribunals will find themselves down the same blind alley as the New Jersey Supreme Court in *Mazdabrook*, having to acknowledge that private residential developments are not generally publicly accessible and thus any attempt to capture them in civil rights or discrimination law via that route will prove difficult, if not futile.

¹⁵⁰ Ibid 23 [76].

¹⁵¹ Ibid 23 [77].

¹⁵² Ibid 23 [79].

¹⁵³ Ibid 23 [78].

¹⁵⁴ Ibid 23 [76].

A preferable approach is that of the Tribunal in *Hulena*, which acknowledged that if a legislative definition of ‘services’ is non-exhaustive, it can include access to premises that are not public places.¹⁵⁵ This seems to have been the argument of Ms Black’s counsel. However, the finding in *Hulena* remains problematic because it is arguably implicit that the ‘goods and services’ referred to in discrimination legislation are only those that are offered to the public or a section of the public. The owners and residents in a strata scheme are not the public.

A far better approach would be for legislatures to directly address the issue of bodies corporate and discrimination legislation by enacting provisions similar to the United States’ *Fair Housing Act*. These would expressly extend prohibitions on discrimination in relation to land and accommodation to include ‘services and facilities’ associated with land and accommodation, and would squarely capture the *regulation* of lots and common property, not just the accessibility of common property. The rationale would be that just as the *acquisition* of housing without discrimination is essential to full participation in civil life, so too is the *use and enjoyment* of housing and any facilities associated with it. As has been noted, the eradication of discrimination in the acquisition of housing would be a hollow victory if people could not then enjoy that housing free from discrimination.¹⁵⁶

That both the acquisition *and* occupation of housing should be free from discrimination has in fact long been accepted in Australia, as evidenced by provisions on land and accommodation in every state and federal discrimination Act. However, when those Acts were drafted, the perception of who was vulnerable to discrimination in the *occupation* of housing was limited to tenants and licensees. Freehold owners, having acquired their interest in land, were only affected by state control, not by private actors.¹⁵⁷ That is the whole point of freehold ownership: to be free from the control of others (long dead ancestors, feudal overlords etc).¹⁵⁸ Neither the neighbours, nor any other private citizen, have control in relation to a freehold owner’s pets, the retrofitting of their home, their use of space or the display of signs or symbols. But strata title has changed all that. It has given private citizens control over freehold interests in land both collectively owned common property and individually owned lots. Some of that control is obviously necessary for collective living, but it should not extend to the ability to prohibit a person keeping an assistance animal in their own home;¹⁵⁹ the ability to refuse to permit retrofitting of a person’s individually and collectively owned property for disability access;¹⁶⁰ the ability to ban breastfeeding on common property, to ban

¹⁵⁵ [2009] NSWADT 119 [36]–[38] (Members Pritchard, Hayes and Schembri).

¹⁵⁶ Oliveri (n 46) 29.

¹⁵⁷ Freehold covenants are the narrow exception to this rule. Freehold covenants are of course the equitable precursor of strata by-laws.

¹⁵⁸ See AWB Simpson, *A History of the Land Law* (Clarendon Press, 2nd ed, 1986) 208–9.

¹⁵⁹ If the particular strata Act only has the traditional prohibition by-laws that restrict guide and hearing dogs, not the more contemporary prohibition on by-laws that restrict assistance animals.

¹⁶⁰ Lot owners have the power to make modifications to their own lot without body corporate approval so long as it does not affect common property. However, many internal renovations inevitably affect common property because they require drilling through walls and floors. Further, exit doors, windows and balconies for individual apartments are invariably common property, not lot property.

religious symbols on apartment doors, or to ban children moving freely around their suburb¹⁶¹ or using their building's facilities.

Many strata schemes would be concerned about the consequences of the application of discrimination law to their schemes, in particular whether it would require them to do expensive retrofitting of buildings for disability access, especially in the context of an aging population. Will the countless three storey walk-ups in our cities be required to install lifts? Will buildings have to replace doors? These questions will be answered by 'unjustifiable hardship' provisions, of the kind considered in *C v A* and *Hulena*. These allow the specific nature of schemes to be taken into account. A four-lot scheme with the ability to collect limited levies from lot owners will not be expected to make the same modifications that a 100-lot scheme with tens of thousands of dollars in administration and capital works funds might be expected to make.

However, many schemes will be required to spend some money.¹⁶² This is the inevitable consequence of a commitment to ensuring the participation of all people in society, regardless of race, gender, age or disability. Full civic participation demands that to the greatest extent possible, all people can make free choices about their housing, rather than being restricted to particular kinds of housing (for example, retirement villages) or sections of our cities (low-rise residential).¹⁶³ If strata schemes play a role in the provision of services and facilities connected with housing, they must play that role consistently with the aims of discrimination law.

V CONCLUSION

Despite the fact that Australian strata law is over 50 years old, there are many difficult legal questions that strata title raises that have not yet been addressed. This is because for many years strata title affected a minority of the population. However, with state urban consolidation policies, that has changed. Millions of Australians now live

¹⁶¹ Liberty Grove, in Sydney's inner west, prohibits any child under the age of 13 from being on common property without a resident adult above the age of 21. The common property includes parks, basketball and tennis courts. The scheme has an internal speed limit of 20 km/hr: see Sherry, *Strata Title Property Rights* (n 4) 210–14.

¹⁶² Some strata residents may be eligible for funding for home modification under the National Disability Insurance Scheme ('NDIS'). However, it is concerning to note that the Operational Guidelines for the NDIS state that before including home modifications in a participant's plan, consideration will be given to whether a body corporate has given permission for the modification. This demonstrates a lack of understanding of strata law, which should never give private citizens the power to deny someone else disability assistance. There is no reason for collective private property rights to trump an individual right to equality and independent living. Further, the Operational Guidelines state that prima facie 'capital building additions such as additions of rooms, stories or lifts or inclinators to allow access to multiple levels of a home' will not be funded. This seems to demonstrate a lack of understanding of housing demographics, and that for millions of Australians multi-storey housing in strata schemes is the norm, and will increasingly become so. See National Disability Insurance Agency, 'Including Specific Types of Support in Plans Operational Guideline: Home Modifications' (Web Page, 18 July 2019) <<https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-support-plans-operational-guideline-home-modifications>>.

¹⁶³ In contrast to Australia, Singapore has been preparing for an ageing population for decades, retrofitting apartments and open spaces. See Belinda Yuen, 'Moving Towards Age-Inclusive Public Housing in Singapore' (2019) 12(1) *Urban Research & Practice* 84.

permanently in strata schemes, and their homes and lives are governed by the power of private bodies corporate.

One of the key questions that has not been adequately addressed in strata law is the application of discrimination legislation to privately owned strata title land and the activities of a body corporate. As this article has demonstrated, the answer to the question posed in the article's title – 'does discrimination law apply to residential strata schemes?' – is 'possibly, but only in limited aspects of body corporate activity, and only in some states'. Victoria has the widest application, with *Black* holding that a body corporate provides goods and services when it manages common property, however the case's reliance on the allegedly publicly accessible nature of common property will be a stumbling block in future cases because most schemes contain no publicly accessible common property. The Queensland case of *C v A* held that a body corporate provided services but only in relation to access to recreational facilities within the building, recreation being within the *Anti-Discrimination Act 1991* (Qld) definition of 'services'. As the vast majority of strata schemes do not include recreational facilities like pools, this could be a problem in other cases. The Tribunal in *C v A* was also adamant that in regulating the use of common property, a body corporate did not provide a service. Like *C v A*, the NSW case of *Hulena* only identified the provision of accessible entrances and exits as a service to which discrimination legislation applied. It explicitly rejected the characterisation of general maintenance and repair of common property as a service and did not consider the question of whether regulating common property could constitute a service. As a result, if a body corporate banned breastfeeding on common property, prohibited all children from using the swimming pool, or banned the display of the gay pride, rainbow flag on balconies, neither *C v A* nor *Hulena*, (and even arguably not *Black*) would provide authority for the proposition that in regulating its own property, a body corporate was providing a service captured by discrimination law. With the exception of Victoria, NSW and Queensland, no other states' courts or tribunals have considered the application of discrimination law to strata schemes.

The lack of clarity in the law is a significant problem because while the collective decisions of private citizens can be beneficial or benign, they can also be intentionally or inadvertently harmful. United States homeowner association scholar Professor Evan McKenzie puts this nicely:

[P]eople cannot be trusted with unlimited power, because we are naturally selfish creatures and our emotions override our intellect. We are easily convinced that, by an amazing coincidence, the very course of action that suits our own self-interest just happens to be the morally correct and wise rule for the entire society.¹⁶⁴

Some of the most harmful actions that a body corporate can engage in are those that impact negatively on people as a result of their age, disability, gender, family status or race. That those impacts are felt within what should be the sanctity and sanctuary of their home intensifies the harm.

The answer to this dilemma can be found in the application of discrimination law to strata title properties, but this should not occur through the piecemeal, strained and inconsistent development of case law. This will not produce clarity for the people who live in or help to run strata schemes. All states need legislation that explicitly extends

¹⁶⁴ McKenzie, *Beyond Privatopia* (n 38) 114.

discrimination legislation to the 'services and facilities' now routinely associated with housing.