# *What You See is Not What You Get: Concepts of Property in the Unit Titles Act 2010*

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A dissertation submitted in (partial) fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago

October 2018

# ACKNOWLEDGEMENTS

Thank you to my incredible and attentive supervisor, Ben France-Hudson. His advice, feedback, insight and willingness to discuss ideas have been invaluable.

Thank you to my friends for all the caffeine, laughs and episodes of *The Chase.*

Thank you to my parents, for everything.

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## *Introduction*

> Unit titles are about communities, about infrastructure, about democracy, about governance, about management, about property rights, and above all, about people. These issues go far beyond "title" matters. Fundamentally, these issues are about neighbours – how people live and work together, how people's lives are controlled by others, and what rights they have.[1]

As this quote suggests, there are many competing interests at stake with unit titles. Unit title ownership gives those who may be unable to purchase a single plot of land the opportunity to own property. Buying into a unit title development gives purchasers a form of individual ownership in their own unit,[2] and a share in the common property to be used alongside the other owners. The owners together form the body corporate[3] and make decisions regarding the development. These types of developments have become important in providing alternative, affordable housing options in New Zealand for a variety of owners from retirees to young people, and there is clear pressure for changes in the complex area of unit titles in the future.[4] Within the next fifty years, there are expected to be 500,000 people living in multi-unit developments in Auckland alone.[5] This increase in demand is likely to intensify longstanding issues with unit title ownership, many of which have come to the fore as part of recent weather tightness problems, as well as earthquake damage and strengthening issues.

Problematically, developers and governments continue to pitch the idea that unit owners are obtaining the same rights they would get if they purchased a single house.[6] Evidence suggests that many people bring "attitudes and habits more attuned to living on stand-alone dwellings on separate sections" to unit title living.[7] However, what you see is not what you get. Such an individual focus contributes to misconceptions about unit titles and can obscure the realities that accompany this form of property interest. Rather than purchasing an individual property, unit owners are instead buying into a community.

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[1] Thomas Gibbons "In Your Neighbourhood" (2011) 172 NZ Lawyer 23.
[2] Unit Titles Act 2010, s 5(1), definition of "unit" as "a part of the land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership".
[3] This is an entity made up of owners in a unit development, and every development must have one. See Tenancy Services "Body corporate governance" <www.tenancy.govt.nz>.
[4] Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 1; and Nikki Kaye and Judith Collins "Apartment reform legislation launched" (3 October 2018) NZ National Party <www.national.org.nz>.
[5] Department of Building and Housing *Departmental Report to the Social Services Select Committee on the Unit Titles Bill 2008* (July 2009) at 8.
[6] Hazel Easthope, Sarah Hudson and Bill Randolph "Urban renewal and strata scheme termination: balancing communal management and individual property rights" (2013) Environment and Planning A 1421 at 1428.
[7] Glaister Ennor and Auckland Regional Council "Unit Titles Act 1972: The Case for Review Discussion Report" (August 2003) at 10.

Issues arise in the unit title context that do not present themselves in the traditional illustration of a single home on a single plot of land. Take the example of Ms Petherbridge, an artistic director, who owned a unit on Lake Hayes, which she would escape to in order to work peacefully.[8] A company owned the other eight units on the same site and wanted to sell the land and the nine units collectively for redevelopment. The company applied to the High Court to enable this, but Ms Petherbridge did not want to lose the unit she valued so dearly.

The Court determined it was just and equitable to cancel the unit plan[9] as the units were past their expected lifespan, and the body corporate was not functioning effectively.[10] The Court ordered the company to purchase Ms Petherbridge's unit to enable the redevelopment. Despite Ms Petherbridge's 30-year ownership and love of the property, the majority interest prevailed – but as Pankhurst J observed, this was "always a potential consequence of acquiring an interest in a unit title development".[11] Many people may be uncomfortable with this outcome. How could someone's rights to their property be defeated by the interests of their neighbours? On the other hand, how could it be fair to let one owner's reluctance prevent the development from progressing, and the property from improving? These points raise difficult questions about what the best outcome in such a situation, or similar situations, might be.

The legislation needs to be workable in order to contend with the competing interests present in these developments. It is timely to ask ourselves: how can we make unit titles work well in New Zealand? I suggest that the answer to this question lies in acknowledging that unit title developments create communities, rather than holding onto the idea that the ownership model is driven by an individual concept of property.

The individual concept of private property does appear to dominate in discussions about the Unit Titles Act 2010 ("the Act"). However, when we confront issues with unit titles, and need to formulate governance and management provisions, the individual focus may not provide the best outcomes in the unit titles context. Addressing the balance of interests in the Act, acknowledging alternative concepts of property, and better enabling people to understand what they are buying could provide a better framework to ensure the longevity of unit titles as a property interest. We should be considering the interests of the body corporate and the owners in light of the fact they exist in a closely linked community. Adopting this focus may result in improved understanding of rights and responsibilities by owners; and therefore, less disagreement and better outcomes. If people understand the community aspects of a unit title, the community can truly thrive, with people benefiting through an explicit recognition of the social aspects of property.

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[8] *Lake Hayes Property Holdings Ltd v Petherbridge* (2014) 15 NZCPR 590.
[9] As required for the High Court to order cancellation under s 188.
[10] At [53].
[11] At [88].

I suggest that a careful analysis of the Act indicates that an alternative social concept of property is already present within its provisions. Interpreted in this way, the Act can be seen as endeavouring to strike an appropriate balance between the rights of individuals to use their property unencumbered, and the need to allow the communities it creates to operate effectively.

All of these reasons lead me to argue that a focus on the individual concept of property may prevent the Act from achieving the best outcomes. Moving away from an individual focus and recognising that an alternative property taxonomy already exists within the Act may produce a better understanding of the statutory regime and could even lead to some improvements to the scheme. Acknowledging and further incorporating a different concept of the intrinsically social nature of property in the Act may allow for more successful governance of communities of owners. This is important as we must provide workable legislation to enable the longevity of this form of property interest.

In order to demonstrate my thesis, I will begin by outlining the scheme of the Act and introducing some of the concepts of private property that appear to be accepted as underpinning the Act. I will discuss the dominant idea of individual ownership and the problems this approach gives rise to in this context. I will then discuss how in order to make the Act work well, we should be much more cognisant of the social ideas of property that have been somewhat obscured by the dominant individual idea.

In the following chapters, I will illustrate (by way of three distinct examples) how both the individual and social concepts of private property are already present in the Act, and how acknowledging that property is intrinsically social could result in better outcomes. In Chapter Two, I explore the issue of repair and maintenance under the Act and suggest that the social concept allows for better allocation of these obligations. In Chapter Three, I focus on the issues of cancellation and earthquake strengthening. I suggest that the recent shift to a lower cancellation threshold for unit plans is best explained by the social concept of property, and that by acknowledging this concept further, we can recognise the need to provide detailed provisions that would allow for the community to reach agreement regarding earthquake strengthening. Finally, Chapter Four addresses how the social concept can justify body corporate operational rules. I suggest, however, that cooperation and the idea of community should not go so far as to unduly restrict the use of property by the individuals in the community. The reality is that there will always be an ongoing search to find the right balance between the community's needs and the individual's desires.

While a shift in ideas will not necessarily provide an answer to how to allocate rights or resolve conflict in every situation, it illustrates that the individual idea of property is not the only account of property that might be appropriate when designing unit title schemes or assessing how the Act should operate. Different concepts of property can generate different outcomes.

There are alternatives to consider when we are thinking about how property interests should operate, and how we can facilitate well-being. In light of all of this I suggest that the social concept of property I advocate for would result in better outcomes and well-functioning communities of owners, as it can allow us to consider options that the individual concept does not.

# *I. Chapter One – Operation of the Unit Titles Act scheme*

In order to build my argument, it is first necessary to outline how the Act works and demonstrate how there are different concepts of private property operating within it.

## *A. General overview of the Act*

The Unit Titles Act 2010 is the statute governing a particular type of property in which multiple owners hold a form of ownership called a unit title.[12] Each owner owns a defined area called a "unit" within a development. "Unit" is broadly defined and includes any space on the land with limited dimensions and that is designed for separate ownership.[13] Most owners own a principal unit, which is also broadly defined as a unit:[14]

- designed for use as a place of residence or business or any other use shown on the plan as a principal unit;
- that contains a building or part of a building, or is contained in a building; and
- includes car parks.

Examples of unit title developments include apartment buildings, office blocks and industrial or retail buildings.[15]

There will also be areas in a development which form the common property. The common property consists of all the land and associated fixtures which are not contained in a unit.[16] This includes areas such as a foyer, or a courtyard. In order to allow for the management of the development and the common property, the unit owners all form an entity called the body corporate. The common property is owned by the body corporate, and the unit owners are beneficially entitled to the common property as tenants in common.[17] Since this is a form of multiple-owned property, management responsibilities and duties are allocated to the body corporate in some instances, and to individual owners in others. Disputes for less than $50,000 can be taken to the Tenancy Tribunal,[18] otherwise jurisdiction will fall to the District or the High Court.[19]

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[12] Tenancy Services "Unit Titles Act 2010" <www.tenancy.govt.nz>.
[13] Unit Titles Act 2010, s 5(1), definition of "unit".
[14] Section 7.
[15] Ministry of Business, Innovation and Employment, above n 4, at 2.1.
[16] Section 5(1), definition of "common property".
[17] Section 54.
[18] Section 171; and Tenancy Services "Unit Title disputes" <www.tenancy.govt.nz>.
[19] Disputes for insurance money up to $50,000, and other disputes between $50,000 and $350,000 will go to the District Court. Above this, jurisdiction will lie with the High Court. See ss 172 and 173; and Tenancy Services "Unit Titles disputes" <www.tenancy.govt.nz>.

It should be self-evident that this form of ownership engages questions of property. I am particularly interested in the idea that people think they are purchasing their own sole piece of property when acquiring a unit title, but in reality, owners are buying a stake in a community. In order for the Act to work well, we should be much more cognisant of social ideas. To illustrate this point, it is necessary to discuss two concepts of property: the individual concept, and the social concept.

### *B. The individual concept of property*

The first of these concepts is the individual idea of private property which is dominant within our western liberal democracy. While this idea is itself contested,[20] it is perhaps best articulated by John Locke.[21] Locke conceptualised private property as allowing an individual "to satisfy his own wants and needs".[22] Locke's concept of private property begins with a state of nature where property is held in common, but can become private property by an individual mixing his labour with it, and giving it "something that is his own" to make it his property.[23] Other people are then excluded from the property, so long as there is enough, and as good, left for others.[24] On satisfaction of these elements, the property could then be dealt with as private property.

Under the individual concept, the purpose or justification of private property is to protect individuals from government interference and allow autonomy.[25] Cathy Sherry discusses how land law was transformed from a feudal system involving relationships of obligation and dominance into "an institution which allows an individual relative but unprecedented autonomy and freedom".[26] This privatisation was crucial to the development of the free land market and democracy.[27] When we talk about property today, property rights "are a good thing because they encourage people to invest their efforts in things they claim and because they encourage trade".[28] Having secure property rights allows everyone to become wealthier.[29] Under this preference satisfaction model, everyone can make their own decisions and use a resource as they please to the exclusion of others, and by doing so, society as a whole gets

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[20] See Ben France-Hudson *Private Property's Hidden Potential* (PhD Thesis, University of Otago, 2015) at 147.
[21] Although this is not in any way the only articulation, with many other accounts available from a variety of authors including William Blackstone and Jeremy Bentham.
[22] Jeremy Waldron *The Right to Private Property* (Oxford University Press, New York, 1988) at 158.
[23] John Locke and Mark Goldie (ed) *Two Treatises of Government* (Everyman, London, 1993) at 128.
[24] At 128.
[25] France-Hudson, above n 20, at 147.
[26] Cathy Sherry "Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property" (2013) 36(1) University of New South Wales Law Journal 280 at 288.
[27] At 288.
[28] Carol Rose *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, Colorado, 1994) 1 at 3.
[29] At 3.

richer.[30] These ideas demonstrate a concept of private property as being centred around an individual having freedom from the state and being able to pursue their own interests.

As Ben France-Hudson notes, this idea of an absolute right remains in our understanding of private property today.[31] Much property rhetoric has focused on individually-owned property, with this seeming to be synonymous with property itself.[32] The public still tends to view property as being, as described by Blackstone,[33] a despotic dominion.[34] New Zealand judicial discussion demonstrates the role of property as a protective mechanism for individuals, with courts construing a requirement of fair compensation where statutes allow for the expropriation of private property.[35]

This preference satisfaction idea is present in the Act. The Act's purpose is "to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individual owners…".[36] There is also reference to this intent, and the idea of "individual owners", in a 2016 Discussion Document reviewing the 2010 Act produced by the Ministry of Business, Innovation and Employment (MBIE).[37] The idea of individual owners is also present in the body of the Act. For example, a principal unit owner is entitled to quiet enjoyment of their unit.[38] A principal unit owner may also make any alterations, additions or improvements to their unit (so long as these are within their unit boundary and do not materially affect another unit or the common property).[39] These provisions indicate that an owner's unit is in a sense their "castle"[40] and can be used to satisfy that individual's preferences. Each owner is viewed as an individual owning their unit to pursue their interests. If an owner wants to paint the interior of their unit pink, this is an alteration they are permitted to make.

However, the individual model begins to collapse once we move outside an individual unit and look more broadly at the use of the development. While there are unlikely to be issues with interior painting, we run into problems when we realise that four upstairs apartments all share an internet cable that runs through a unit on the ground floor. If the ground floor owner wishes to make alterations to their unit, the preference satisfaction model does not help us determine

[30] France-Hudson, above n 20, at 148.
[31] At 148.
[32] Carol Rose "Left Brain, Right Brain and History in the New Law and Economics of Property" (2000) Faculty Scholarship Series Paper 1801 at 482.
[33] William Blackstone *Commentaries on the Laws of England Book the Second* (Robert Bell, Philadelphia, 1771) at 2.
[34] David Fagundes "Explaining the Persistent Myth of Property Absolutism" in Robin Malloy and Michael Diamond (eds) *The Public Nature of Private Property* (Ashgate Publishing Limited, Surrey, 2011) 13 at 19.
[35] *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149 at [45].
[36] Section 3.
[37] Ministry of Business, Innovation and Employment, above n 4, at 2.1.
[38] Section 79(d).
[39] Section 79(e), and subject to s 80(1)(h) and (i), which require notification and consent in certain instances.
[40] *Semayne's Case* All ER Rep 62.

how the resource should be shared, or what obligations the ground floor owner may owe to their neighbours. The individual concept of property cannot explain the shared nature of many aspects of a unit title development. A unit may appear to be purely individual property, but as Carole Rose observes, with property, things are more complicated than believing what you see is what you get.[41]

### *C. The alternative social concept of property*

While the preference satisfaction model of private property has dominated,[42] it is not the only concept of private property. In order for the unit title scheme to operate well, it would benefit us to acknowledge alternatives beyond considering the individual. A number of scholars have attempted to outline how these alternative ideas of private property might work. I will detail the theories of three authors in order to give some idea of the alternative discourse available.

Some of this early alternative work was undertaken by Carol Rose. According to Rose, while we have a "dominant, preference-satisfying practical understanding of property", this is subject to "constant albeit often ill-articulated intrusions from the traditional, quite divergent understanding of property as 'propriety'".[43] Under her theory, the purpose of property is "to accord to each person or entity what is 'proper' or 'appropriate' to him or her", with this being "that which is needed to keep good order in the commonwealth or body politic".[44] This indicates a view that the role of property is much broader than preference satisfaction.

Rose further argues that individual ownership is not necessary for property to be efficient, and that "communities can govern common property on the basis of common norms".[45] She builds on this, arguing that "individual property is itself a kind of collective property or metaproperty; a private property regime holds together only on the basis of common beliefs and understandings".[46] Rose gives the example of the choices fishermen on a large lake make in order to sustain the fish.[47] The fishermen cannot merely follow the preference choice and take as many fish as they want, because the fish are a limited resource.[48] The best option is for the fishermen to cooperate and ensure that everyone gets some fish but no one takes too much, so the resource can continue to replenish.[49] While classical stories of property try to gloss over the need for cooperation in private property, Rose uses this example to show that people must

[41] Rose *Property and Persuasion,* above n 28, at 297.
[42] France-Hudson, above n 20, at 152.
[43] Rose *Property and Persuasion,* above n 28, at 52.
[44] At 58.
[45] At 5.
[46] At 5.
[47] At 35.
[48] At 35.
[49] At 36.

cooperate initially to set up the system of private property.[50] People must also continue to cooperate beyond this, as they must continue to respect the entitlements of others.[51] Her analysis shows the social elements, such as cooperation, that must exist in order for us to have a system of private property at all.

Hanoch Dagan gives another concept of private property which highlights its intrinsically social nature. Dagan focuses on the individual, as in the classical liberal concept of property. He develops a "contractarian version of the community-based conception of social obligation".[52] Under his approach, community is important to the extent that it contributes to individual preference.[53] Dagan still views the right to exclude as typical of many property institutions but does not see this, or any other feature, as the ultimate core of property.[54] While there are some property institutions that are constructed as individualistic, there are instances that might be dominated by a more communitarian view of property.[55] In these communitarian property institutions, "the applicable property configuration includes rights as well as responsibilities".[56] He notes values such as community and social responsibility are balanced alongside autonomy and personhood, with property being about both exclusion and inclusion.[57]

Dagan's approach demonstrates that while aspects of the individual concept, such as the right to exclude, are still present in an alternative conception of private property, these do not always trump the other values present in property institutions. Private property can go further than simply allowing a single owner to do as they choose and exclude all others. Dagan demonstrates a liberal concept of property going beyond the mere satisfaction of an individual's preferences and recognises the value in private property having more social aspects such as community.

The high point of these ideas can be found in the work of Gregory Alexander. Alexander suggests that the moral foundation of property is grounded in human flourishing, and thus property's goal is also to promote human flourishing.[58] By human flourishing, Alexander means both enabling people to develop the capacities necessary for a good life (with social relationships and community a part of this) and the capacity to make meaningful choices.[59] For Alexander, communities "are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our

[50] At 37.
[51] At 37.
[52] Gregory Alexander *Property and Human Flourishing* (Oxford University Press, New York, 2018) at 42.
[53] At 43.
[54] Hanoch Dagan *Property: Values and Institutions* (Oxford University Press, New York, 2011) at 37.
[55] At 42.
[56] At 42.
[57] At 54–55.
[58] Alexander *Property and Human Flourishing,* above n 52, at 4.
[59] Gregory Alexander "The Social Obligation Norm in American Property Law" (2009) 94 Cornell Law Review 745 at 761–762.

capabilities".[60] Notably, like Rose, Alexander considers these ideas have always existed, tracing them back to Aristotle.[61]

Alexander notes that the typical image of property is of an owner having the right to exclude others, and owing no further obligations to them.[62] Alexander discusses how property owners owe obligations far beyond what the conventional view of property suggests, as "[p]roperty rights are inherently relational, and because of this characteristic, owners necessarily owe obligations to others".[63] Alexander's approach produces a concept of private property as intrinsically social, and leading to obligations not recognised by the individual concept.

To explain the relational aspects of property, Alexander proposes the metaphor of a 'good neighbour'.[64] His good neighbour does more than simply comply with legal restrictions, and Alexander gives the example of a condominium[65] owner who shares a wall with their neighbour, and who avoids placing their speakers against this shared wall, thus being a 'good neighbour'.[66] For Alexander, this metaphor highlights the relationship between the owner and the community they live in, and fits with the foundation of human flourishing.[67] By placing the owner in a community, he argues we can see how communities allow the development of owners' necessary capabilities for human flourishing including personal autonomy, dignity and sociability.[68] While other metaphors such as seeing an owner as a gatekeeper (perhaps the concept Locke envisaged) create an idea of isolation, seeing an owner as a neighbour "stresses the socially embedded conditions of property owners".[69]

Alexander's approach does not dismiss all of the benefits to be achieved under the individual concept, as he believes that autonomy can still develop under a social concept. The social concept can provide for pursuit of individual interests, but in a context that recognises the importance of the community that the property is situated in. Adopting a purely individual concept may not be able to provide for Alexander's idea of flourishing, to the same extent, as it does not consider the wider community.

Further analysis is required to articulate the principles on which these counter traditions operate, and to identify which has predictive proof. However, such discussion is beyond the scope of this thesis. The general impact of these ideas is to suggest that property is intrinsically

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[60] Alexander *Property and Human Flourishing,* above n 52, at 8.
[61] Alexander "The Social Obligation Norm in American Property Law", above n 59, at 761.
[62] Alexander *Property and Human Flourishing,* above n 52, at 39.
[63] At 40.
[64] At 69.
[65] The American equivalent of a unit title.
[66] At 70.
[67] At 71–73.
[68] At 73.
[69] At 73.

social. Alexander's theory represents the pinnacle of these ideas.[70] Therefore, I will use his theory of the importance of community as the metric by which I will measure the extent to which the Unit Titles Act contains approaches to private property that are not predicted under the individual concept.

Initial application of this theory suggests that these social ideas are already present within the Act. This is apparent in the initial example of the wording "communities of individual owners" found in the Act's purpose.[71] The MBIE review also notes that "unit title ownership is about a 'community of owners' exercising their property rights by democratic decision-making".[72] A clear shift from the long title of the previous Unit Titles Act 1972, which referenced "individual proprietors", is apparent. There is now recognition that the owners form a community and cannot be viewed as entirely separate people pursuing their own preferences. Instead, they share aspects of the development and can be seen as a whole for some purposes.

An alternative concept of private property as intrinsically social is already present in the Act. I will now explore three discrete areas in order to demonstrate that acknowledging the social concept could allow the scheme to work better.

[70] Although there are many other articulations of alternative ideas available, for example the discussion of Joseph Singer's ideas in Cathy Sherry *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, New York, 2017) 47–65.
[71] Unit Titles Act 2010, s 3.
[72] Ministry of Business, Innovation and Employment, above n 4, at 2.3.

## *II. Chapter Two – Repair and maintenance*

### *A. Allocation of repair and maintenance rights*

As noted in Chapter One, the Act allocates rights and responsibilities regarding repair and maintenance of units and common property to both individuals and the body corporate in different contexts. An exploration of these allocations indicates that both the individual and social concepts of property are present in the Act. The ramifications of this are that while some aspects of the individual concept remain in the obligations on unit owners, the social concept can provide a more principled basis on which to allocate responsibility, leading to better outcomes.

#### *1. Obligations of individual owners*

The Act first considers the obligations of individuals. The owner of a principal unit has the right to "make any alterations, additions, or improvements to his or her unit so long as these are within the unit boundary and do not materially affect any other unit or common property".[73] As noted in Chapter One, the term "principal unit" has a wide ambit.[74]

Under s 80(1)(g), a principal unit owner has an obligation to repair and maintain their own unit so that no damage or harm is caused or has the potential to be caused to the common property, any building element, any infrastructure, or any other unit.[75] The right to make any changes is subject to the requirement to notify the body corporate of the intention to carry out additions before the work starts.[76] Also, the additions must not materially affect any other unit or the common property unless the body corporate has given written consent.[77]

These provisions indicate an individual view that owners can do what they please in terms of repairs and maintenance to their own unit so long as this does not encroach on any other parts of the development or affect other units. A unit owner can install a new kitchen, or carpet their floors, or paint their walls any colour, since these acts are unlikely to encroach on other areas. The allocation of this responsibility reflects the balance in the Act's purpose between individuals and the community, by allowing an individual to do as they wish to an extent, and also ensuring that the community living arrangements are maintained.

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[73] Section 79(e).
[74] See page 9 of this thesis.
[75] Section 80(1)(g).
[76] Section 80(1)(h).
[77] Section 80(1)(i).

However, a principal owner's ability to repair and maintain their unit is not absolute. This is because they must allow for the entry of the body corporate for certain purposes.

A principal unit owner:[78]

> must also permit the body corporate to enter the unit at any time in an emergency and at all reasonable hours, and after giving reasonable notice, for any of the following purposes: …
>
> (ii) to maintain, repair, or renew any infrastructure for services and utilities that serve more than 1 unit and any building elements that affect more than 1 unit or the common property, or both:
> (iii) to maintain, repair, or renew any common property: …

The individual right to do as one chooses is thus restricted by the interests of other owners and the need to maintain the shared areas of the development, further indicating the inherent balance in the Act.

*2. Obligations of the body corporate*

Under s 138, the body corporate must repair and maintain:[79]

> (a) the common property; and
> (b) any assets designed for use in connection with the common property; and
> (c) any other assets owned by the body corporate; and
> (d) any building elements and infrastructure that relate to or serve more than 1 unit.

"Building elements" are widely defined to include the external and internal components of a building that are necessary to its structural integrity, its exterior aesthetics, or the health and safety of the people who occupy or use the building.[80] "Infrastructure" includes things such as pipes, drainage, electricity and internet access.[81] If the body corporate undertakes repairs that were substantially for the benefit of one or some of the units, or benefit one or some of the units more than the others, the expenses incurred are recoverable from the owner, or can be apportioned among the units getting a benefit from it.[82]

The allocation of this responsibility to the body corporate is notable. The body corporate has responsibility for things such as repairing balconies and retaining walls, and any maintenance

[78] Section 80(1)(a)(ii) and (iii).
[79] Section 138(1).
[80] Section 5(1), definition of "building elements".
[81] Section 5(1), definition of "infrastructure".
[82] Section 126(1) and (2).

needed on the core services in the building. Significantly, this was a change introduced in the 2010 Act. The 1972 Act addressed repair and maintenance in the default body corporate operational rules. However, as I will discuss further in Chapter Four, these rules could be amended, meaning the allocation of rights and responsibilities was not fixed or certain as it now is in the 2010 Act. Also, there was no reference in the 1972 Act to building elements or infrastructure, or any ability for the body corporate to enter units to undertake repairs, as there now is. Rather, the 1972 Act left any repairs in individual units that could have wider impacts to be completed by an individual owner. In the words of Hon Phil Heatley, when introducing the Unit Titles Bill 2008 to the House of Representatives, this change allows the body corporate "to make sound decisions when repair and maintenance needs to be undertaken".[83]

Under the current legislation, individual owners are no longer left to undertake repairs in instances where the damage has a wider impact for the development. Instead, the Act recognises that certain parts of the building need to be managed with the impacts on the community in mind. The provisions acknowledge the relational aspects of private property, and the impacts an owner can have on the others. The ability for the body corporate to undertake work that is in the interests of all the unit owners to keep the development up to a certain standard, and then recover the costs later, further demonstrates the social concept of property. If part of the structure is left to deteriorate, the problem extends beyond an individual to the whole development. While some autonomy is compromised, the broader goal of the well-being of the development can be achieved by allocating responsibility to the body corporate.

*3. Acknowledgement of the social concept in relation to repair and maintenance*

By itself, the individual concept of property would not operate successfully here, since the Act is addressing a group of owners who must consider the impacts their actions have on each other. Moreover, the social concept of property allows better outcomes, as it can ensure efficient repair, and then distribute costs among those who benefit in a way that reflects the broader community interest in maintaining the development.

If a purely individual approach were taken, the body corporate could leave each owner to repair anything that relates to their unit, making that owner responsible for all the costs of the repairs. However, individual responsibility is not the only possible outcome in the community context. Take the example of a leaking roof. The section that needs repair is over owner A's unit. If we decide that a unit owner should be responsible for everything that falls within their remit, the body corporate could argue that this part of the roof only relates to A's unit, and therefore A must repair it and fund these repairs. Or, A could try to dispute responsibility for the roof and argue that this repair falls to another unit, for whom the roof may be a balcony. The individual

[83] (5 March 2009) 652 NZPD 1715.

concept leads to issues of non-compliance and disputes over responsibility. Alternatively, under a social concept of property, A could argue that due to being part of the development, other owners must also contribute to the repair. The roof serves more than one unit, since all of the units get the benefit of a watertight roof, and if it is not repaired, the water damage will begin to affect those below.

Under the 2010 Act, the roof is part of the building elements of a building, as are balconies.[84] Section 138 therefore allocates responsibility to the body corporate in the first instance, with cost recovery available afterwards. The Act adopts the social concept of property, seeing owners owing obligations to others and sharing responsibility. The repair costs can be shared amongst more unit owners, since the wider community will be served by fixing the roof and ensuring the damage does not worsen and affect the development as a whole. While the part of the roof that is damaged falls on A's property, the 2010 Act recognised taking an individual approach and forcing A to pay for all of the repairs may not lead to the best allocation of responsibilities, and therefore the best outcome for the development.

The social concept of property can be seen in the following court decisions. These two cases indicate that the individual approach is not dominant in how courts are reaching decisions.

The first case of *Young v Body Corporate No 120066* fell under the 1972 Act. Although this previous legislation was quite different and did advance the individual concept, even then there was still evidence of the social concept. In *Young,* a development of two blocks of six apartments was suffering from leakage issues.[85] The two blocks had split into two groups on opposing sides regarding what repairs were required.[86] Water was entering through external windows, and some individuals attempted to repair the defects in their apartments, but the leakage worsened.[87] There was disagreement over whether the work undertaken should be widespread rectification work, or smaller, more targeted repairs.[88] Resolutions were passed to implement full remedial works.[89]

There was argument over whether a rule requiring repair of the exterior of the building in all respects was ultra vires, to the extent that it might cover windows and doors that, while part of the exterior, were not part of the common property.[90] The High Court found the rule was reasonably necessary to allow the body corporate to carry out its statutory duty to keep and maintain the common property in good repair.[91] The decision indicates that even under the

[84] Section 5(1), definition of "building elements".
[85] *Young v Body Corporate No 120066* (2007) 8 NZCPR 932 (HC).
[86] At [5].
[87] At [6]–[7]
[88] At [10].
[89] At [13]–[15].
[90] At [31].
[91] At [32].

lesser obligations in the 1972 Act, the courts were applying the legislation in a way that recognised the social concept of property and the relational aspects present in a unit title development. Individual self-preference did not prevail, and instead the court considered what was best for the development as a whole.

The group of minority owners who voted against the resolution in *Young* also tried to argue that the resolution was inequitable.[92] The only argued effect was that the minority had objected to the resolution, so the court found that no part of the resolution was materially unfair or unjust.[93] Further, the lower apartments were susceptible to damage from defects in the apartments above, so it was not inequitable to require those on the ground floor to contribute equally with those above.[94] If the Court had taken an individualistic view that each owner was responsible for their own unit, the costs would not have been distributed in this way. This case demonstrates that even under the 1972 Act, courts were making decisions in favour of the community interests and allowed the social concept of property to prevail. These provisions are explicit in the 2010 Act, due to codification in the body of the statute, meaning the social concept is now enhanced.

The second case, *Wheeldon v Body Corporate 342525,* dealt with similar issues but fell under the 2010 Act. As in *Young,* the owners of this leaky complex had different views as to whether extensive or targeted repairs were needed.[95] The group of owners advocating for targeted repairs thought that only those unit owners in units directly affected should be responsible for covering the cost of these repairs.[96] This group were therefore advocating for the individual concept of property, as they believed they should be able to use their property as they chose.

Justice Muir in the High Court "reminded owners that they are bound by the Act's regime and do not have the luxury of choosing how and when they might repair parts of the building".[97] The body corporate's repair obligation under s 138 was found by both the High Court and the Court of Appeal to take priority over the owner's repair obligation under s 80(1)(g).[98] The Court of Appeal held that s 138 gave the body corporate the authority to repair individual units where those repairs were needed to maintain the common property.[99] The High Court observed that the speech introducing the Bill to the House, noted above, supports this interpretation, as it allows a body corporate to act "quickly and decisively on behalf of all owners and for the good of the development as a whole".[100]

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[92] At [42].
[93] At [49]
[94] At [52].
[95] *Wheeldon v Body Corporate 342525* [2015] NZHC 884 at [2]–[3].
[96] At [3].
[97] Liza Fry-Irvine "Unit Titles Act 2010: playing by the Body Corporate rules" (paper presented to New Zealand Law Society Property Law Conference, Auckland, June 2016) 125 at 128–129.
[98] *Wheeldon* (HC), above n 95, at [48]; and *Wheeldon v Body Corporate 342525* [2016] NZCA 247 at [47].
[99] *Wheeldon* (CA) at [47].
[100] (5 March 2009) 652 NZDP 1713 as cited in *Wheeldon* (HC), above n 95, at [38].

The argument under an individual concept of property therefore failed, possibly because it would not have led to an optimum outcome. Owners of a unit title cannot simply choose to repair or not, as their interests are not the only ones to consider. Applying a social concept of property allows us to understand that private property is relational, and that the actions of one owner can have consequences for the community.

These two decisions reach similar outcomes in different contexts. The cases indicate that the preference satisfaction model would not succeed here. If the individual concept had been adopted, owners could have ignored those necessary repairs and maintenance which they believed did not apply to them, leading to smaller scale repairs by those who did undertake the work. This clearly would not have been the best outcome for a unit title, as the damage could worsen by taking this individualistic approach. Instead, we can see the social concept of property present in the judges' reasoning. The outcomes were based on what was best for the community, and the fairest allocation of costs and responsibilities, rather than what certain individuals desired.

### *B. Scheme for repair*

The ability to apply to the High Court to settle a scheme for repair further illustrates that both the individual and social concepts of private property are present in the Act. Under s 74, the body corporate or a unit owner can apply to the High Court to settle a scheme "if any building or other improvement comprised in any unit or on the base land is damaged or destroyed, but the unit plan is not cancelled".[101] This provision provides a remedial route when the body corporate cannot agree who is responsible for repairs. Such a scheme could be used for leaky buildings, or following an earthquake, where repair is often urgently needed, and agreement can be impossible.

Section 74 recognises that the individuals which make up a unit title community can disagree on the appropriate repairs to a development, the allocation of costs, or that one person can simply choose to disengage. If the individual concept were permitted to prevail, there may be no mechanism for resolving these disputes. Under Locke's theory, an individual could choose to use their property as they wished. If they decided to disengage, or did not agree with the repairs, it was not for anyone else to require them to participate or persuade them to change their mind. Application to the court allows the conflicting individual and community interests to be weighed up and provides for a solution to be reached that may benefit the wider development, rather than privileging the desires of one owner who disagrees with the majority of his or her co-owners.

[101] Unit Titles Act 2010, s 74(1).

The applications for such a scheme often involve one or a couple of the unit owners not wanting to engage in the body corporate decision-making process for repairs, holding up progress since a remediation approach without court oversight requires the consent of all owners.[102] Under the individual concept of property, this is an acceptable outcome, as owners should be able to do what they choose with their property and control how it is managed. In contrast, under the social concept of property, owners must accept the obligations that come along with a property interest and understand that this can mean acting in the interests of the community, rather than their own.

By providing a mechanism for relief, the Act has recognised that the individual concept of property will not always lead to the best outcomes for the management of unit titles. Instead, by acknowledging the social nature of private property, and its justification as allowing flourishing, we can recognise the need to create mechanisms for effective decision-making even where an individual may disagree.

### *C. Improving the repair and maintenance provisions*

While these provisions exemplify that the social concept of property is already present in the Act, it is possible that the scheme could be improved by incorporating this concept further.

Section 138 only applies to building elements and infrastructure in primary units and does not permit a body corporate to act in other circumstances where a more minor repair may be needed, but which could still impact other units. For example, the body corporate does not appear to have the authority to enter and repair a leaky shower, since a shower would not be a building element or infrastructure that serves more than one unit, but it would likely have consequences for a unit below if it continued to leak.[103] A solution could be to adopt the approach of overseas jurisdictions and give the body corporate power to enter a unit when a unit owner has failed to comply with a written notice to repair.[104] While under the individual concept, a unit owner should be able to determine whether or not they repair, this amendment would reinforce the concept of community. The body corporate could further promote the flourishing of the entire development by ensuring every owner is doing their part.

There can also be issues with demarcation of boundaries between units and common property, as there is no requirement for three-dimensional ("3D") plans.[105] It is not always apparent where one unit ends, and another begins, meaning it can be difficult to determine who is

[102] Elizabeth Toomey and others *Revised Legal Frameworks for Ownership and Use of Multi-Dwelling Units* (Building Research Association of New Zealand Research Report ER 23, Wellington, 2017) at 202.
[103] At 197.
[104] At 197.
[105] At 193–194.

responsible for certain areas. A developer may decide that demarcation does not matter so long as an individual owner has an area that is theirs. Acknowledging that property is social indicates the desirability of 3D plans, and incorporating this change could allow developers to understand the need to have clear demarcation so a community can effectively determine responsibility for different parts of the property.

Another aspect that could be improved is the promotion of the true, social nature of this form of property interest. Hazel Easthope and Bill Randolph discuss how, in Australia, a common disagreement is over whether the owners' corporation[106] or individual owners have responsibility for paying for repairs to the common property.[107] They observe that there is a mismatch between the collective responsibilities present in the legislation, and the "practice, perceptions and preferences" of the owners.[108] Easthope and Randolph note that "[m]aintaining the illusion that strata property is equivalent to ownership of a detached property has been central to the development of this form of property in Australia".[109] In support of my argument, they find that "[p]uncturing this illusion may be a necessary requirement to put strata living on a more equitable and workable footing".[110] Broad community education will be needed to achieve this.[111] Therefore, we should move to incorporate this idea further into government publications. The idea of community is already present in MBIE's review.[112] Further engagement with this conceptual acknowledgment of the reality of unit title living and its incorporation into any legislative change could produce better outcomes as people could truly understand what they are purchasing.

### *D. Conclusion on repair and maintenance*

Maintaining the development to a certain standard benefits the development as a whole, and this is one area where an individual's interests are superseded by the community's. Acknowledging the social concept of property would allow people to realise they are not buying an individual home and could better prepare them for both the costs and benefits that come with being part of a community. People can then understand the form of the interest that they are buying, allowing certainty and possibly less litigation over issues such as cost allocation. If people realise the benefits in distributing costs among the community, there may be more buy-in to these kinds of developments. Any maintenance issues can be resolved quickly by well-functioning bodies corporate.

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[106] The equivalent of the body corporate in Australia.
[107] Hazel Easthope and Bill Randolph "Collective Responsibility in Strata Apartments" in E Altmann and M Gabriel (eds) *Multiple Owned Property in the Asia-Pacific Region* (Palgrave McMillan, London, 2018) 177 at 186.
[108] At 189.
[109] At 191.
[110] At 191.
[111] At 191.
[112] Ministry of Business, Innovation and Employment, above n 4, at 2.3.

The example of repair and maintenance illustrates the acknowledgment of the social concept of property within the Act and in the reasoning of the courts, and the better outcomes this approach can produce for the development as a community.

## *III. Chapter Three – End of life decisions*

Important decisions need to be made about a unit development's future as it ages and reaches the end of its usable life. The owners will have to consider whether to sell the land for redevelopment, demolish the buildings, or strengthen them to allow the development's life to continue. The Act provides for cancellation of a unit plan following an application,[113] allowing the land to be sold as a fee simple. However, the Act does not provide a specific mechanism for undertaking earthquake strengthening when damage has not yet occurred. This is an end of life decision that body corporates may face, for if they cannot strengthen the building, it may no longer be safely inhabited and need to be demolished. Consideration of these end of life decisions indicates that the individual concept alone cannot operate effectively here, and that a social concept of private property can create different, better outcomes.

### *A. Cancellation thresholds*

The Act has carved out a particular regime for cancellation of the unit plan. Cancellation can occur by application either to the Registrar-General of Land or to the High Court. In order to apply to the Registrar-General, the body corporate must agree to this application by special resolution, meaning 75 per cent of the eligible voters (who vote) must decide in favour of it.[114] To apply to the High Court, the body corporate can again apply after passing a special resolution.[115] Alternatively, one or more unit owners can apply.[116]

The High Court will only cancel a unit plan if satisfied that it is just and equitable to do so.[117] The Registrar-General cannot consider such matters and must cancel the unit plan once an application has been made.[118] This means a unit plan could be cancelled by the Registrar-General when up to 25 per cent of the owners object. There is a process for minority objections, with the decision to cancel coming before the Tenancy Tribunal or High Court, where it can be upheld, overturned or compensation can be ordered.[119]

Following the cancellation of the unit plan, the fee simple title will then vest in the unit owners as tenants in common in the proportion of their ownership interests.[120] The body corporate is dissolved upon cancellation.[121] Further, the Act has assisted decision-making by permitting the

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[113] By applying under either ss 177 or 187.
[114] Sections 177 and 98(4).
[115] Section 187.
[116] Section 187.
[117] Section 188.
[118] Section 179.
[119] Sections 177(4), 212–215.
[120] Annabel Sheppard "Unit Titles Act 2010: Cancellation of Unit Plans and Reassessment of Ownership Interests" (paper presented at New Zealand Law Society Unit Titles Intensive, April 2013) 151 at 154.
[121] Section 185.

decision to be made based on the votes actually placed, rather than of all the owners, removing issues with absentee or disengaged owners holding up progress.

It is noteworthy that the Act has permitted a threshold of 75 per cent of unit owners for this decision, but then in relation to things like earthquake strengthening, as I will discuss below, unanimous decision-making is required. For someone like Locke, a threshold requiring unanimity for decision-making is preferable as it allows each individual owner to exercise their rights over their property. However, on a social account, we can recognise that allowing individual self-preference to prevail is not the only possible outcome, and instead can try to achieve what will be fair in the context of the community.

In contrast to the current position, unanimity was required under the previous 1972 Act for cancellation by the Registrar-General, as the application had to be by "the proprietor or proprietors of all the units".[122] As noted above, unanimity represents the individual concept as it allows each individual owner to exercise their self-preference. However, it has the consequence that if one owner votes against the application, that owner will be the only one pleased with the outcome.

One of the key reasons for introducing decision-making via a special resolution in the 2010 Act, rather than requiring unanimity, was to ensure that a minority cannot prevent the rest of the community from operating. Members of the House in Parliamentary debates saw the threshold of 75 per cent as preventing the situation of holdout from one individual, which impedes progress and is unfair to all of the owners.[123] This suggests that Parliament saw the need to facilitate governance decision-making in unit title developments, with a lower threshold being the solution to ensure the community can act in circumstances where owners are intransigent.

Further, the Departmental Report to the Select Committee considering the Unit Titles Bill 2008 noted that the introduction of a lower threshold for decision-making throughout the Act was "designed to encourage efficient management and increased owner participation".[124] Unanimity had been "cumbersome, time-consuming and impractical, particularly for larger developments, and often led to holdout situations", preventing the body corporate acting in the interests of the majority of owners.[125] By removing these issues, better outcomes may be achieved, as progress and development are facilitated.

[122] Unit Titles Act 1972, s 45.
[123] (5 March 2009) 652 NZPD 1718–1719.
[124] Department of Building and Housing, above n 5, at 21.
[125] At 21.

### *1. Illustrations*

The following two cases demonstrate the competing concerns, and the balance that has been struck in favour the community's interests, reflecting the social concept of private property, with property having impacts beyond an owner simply using their property as they choose.

*World Vision of New Zealand Trust Board v Seal* was a case under the 1972 Act discussing the "just and equitable" requirement for the Court to cancel a unit plan.[126] This was the first case addressing the Court's jurisdiction to cancel a plan, and involved owners of a mixed-use development consisting of six residential apartments and an office building.[127] World Vision argued that the office building was no longer appropriate for their purposes, and they wanted to cancel the unit plan so that the other residents would lose the ability to veto any future development.[128] World Vision sought the division of the property into two lots, one for the residential apartments as a new unit plan, and the other as a fee simple housing the office building.[129] World Vision had entered into a contract to sell the land if this division was made.[130]

World Vision argued that the just and equitable test required balancing the competing rights and interests of those involved, but Heath J determined this was incorrect.[131] That approach would require the Court imposing its judgement for the body corporate where the Act required unanimity (as it did under the 1972 Act),[132] and it would give insufficient weight to the expectations and the diverse interests present in a mixed use development.[133] World Vision had to satisfy the court that cancellation was "just and equitable" in light of these observations.[134]

Justice Heath discussed some situations where the use of the Court's jurisdiction would be appropriate, including where the building is no longer fit for its original purpose (such as if the building has deteriorated or cannot be maintained due to a lack of funds), or where the body corporate is so dysfunctional intervention is needed.[135] This decision indicates a social concept of private property in the 2010 Act, with the relationship between the owners, and the functionality of the body corporate, being crucial to this form of property. If communication breaks down, there remains an alternative process of applying to court under s 187 to prevent negative outcomes such as continued deadlock.

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[126] *World Vision of New Zealand Trust Board v Seal* [2004] 1 NZLR 673.
[127] At [5].
[128] At [12].
[129] At [56].
[130] At [57].
[131] At [76].
[132] Unit Titles Act 1972, s 45, required application of the proprietor or proprietors of all the units.
[133] At [76].
[134] At [77].
[135] At [86].

Ultimately, World Vision was seeking cancellation in order to get the best price for the land, which was not a sufficient justification to override the interests of the other proprietors.[136] This was not a case where the offices needed demolition, or where there was deadlock.[137] Just because it was no longer convenient or advantageous to hold the unit title did not create a reason to override the interests of the other owners, and World Vision would have to try to work out a mutually agreeable solution.[138] The individual interests in using the office block freely did not prevail in this instance, indicating the social concept of property being interpreted within the Act. When a person enters a unit title development, they should realise that they owe obligations to their neighbours. Property is relational, and decision-making cannot be purely up to the individual.

The issue of cancellation also arose in *Lake Hayes Property Holdings Ltd v Petherbridge,*[139] the case discussed in this paper's introduction. While the Court's jurisdiction to cancel was not invoked in *World Vision,* it was found to be just and equitable to cancel in *Petherbridge*.[140] The differences in *Petherbridge* were that the body corporate had been essentially defunct for thirty years, and the site needed redevelopment as the units were past their economic lifetime.[141] The interests of the majority prevailed over those of a woman who loved her property, as this was the best outcome for the governance and management, as well as the continued life, of the development.

Under the individual concept of private property, this outcome seems difficult to justify, since Ms Petherbridge clearly did not want to give up her property. However, allowing the individual to always do as they please will not produce the best outcomes in the unit title context where there are multiple owners and competing views. Acknowledging a concept of private property as intrinsically social, with the need to consider obligations to others, indicates that we must consider all the circumstances and determine where the balance should lie. While in some instances this could mean one individual owner holds up development, and in others the will of the majority wins, this concept allows for the possibility of alternative outcomes that could produce a fairer result, rather than automatically turning to consider individual preferences.

In instances where the land requires extensive redevelopment to survive, or where the body corporate is not functioning as it should, it is understandable that cancellation may be the best result for the community as a whole. It ensures that a single owner does not prevent property from achieving its potential, and also provides a mechanism to allow management and governance decisions to be made even where the owners will not engage with each other. A

[136] At [94].
[137] At [95].
[138] At [96]–[97].
[139] *Petherbridge,* above n 8.
[140] At [53].
[141] At [53].

lower threshold allows the community to continue to function and the development to progress where this is in the interests of the majority or is just and equitable. It is easier to accept this outcome if we further acknowledge a social concept of property and understand the implications that come with being part of a community of owners.

*2. The choice between different concepts of property*

Acknowledging unit titles as a community, rather than a group of individuals, makes it easier to understand the transition to the lower threshold. When considering a lower decision-making threshold, we need to ensure that we are striking the correct balance between the rights of the community and the rights of individual owners.

Douglas Harris and Nichole Gilewicz note that a rule requiring unanimity and a rule requiring majority "present different models or conceptions of property. The unanimity rule bolsters the ownership interest, albeit at the cost of the exchange value; the supermajority protects the exchange value, at the cost of the ownership interest".[142] This indicates that depending on which threshold we take, we can adopt a certain conception of property. So, determining which concept of property we wish to pursue in the Act can affect which approach to take, and therefore which outcomes we are striving for in unit title developments.

Harris and Gilewicz go on to note that "[c]ondominium has the virtue of reminding us that private property is embedded in community".[143] This demonstrates the idea that I have been advocating for – we cannot thrive in private property without some conception of community. The individual concept of private property alone will not allow us to achieve flourishing and the benefits of community living. Realising that property is relational and that being part of a community will allow us to thrive allows us to see that diminished individual rights can be justified.

Further support for a lower threshold comes from the theoretical work on the tragedy of the anticommons. Michael Heller argues that too many rights of exclusion can result in underuse of a resource, and therefore a tragedy of the anticommons.[144] If the consent of all owners is required, and every owner can exclude the others from cancelling the unit plan, then no one will be able to progress and make choices regarding the future of the land, resulting in such a tragedy. Therefore, there is some validity for lowering the threshold.

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[142] Douglas Harris and Nichole Gilewicz "Dissolving Condominium, Private Takings, and the Nature of Property" in B. Hoops and others (eds) *Rethinking Expropriation Law II: Context, Criteria and Consequences of Expropriation* (Eleven, The Hague, 2015) 263 at 293.
[143] At 295.
[144] Michael Heller "The Tragedy of the Anti-Commons: Property and the Transition from Marx to Market" (1998) 111 Harvard Law Review 621 at 624.

Before the cancellation threshold was lowered from unanimity to majority in New South Wales, Cathy Sherry commented that demolition or redevelopment might also be in the interests of the community at large, not just the owners who bear the costs.[145] She notes that "a deteriorating strata building, or whole row of deteriorating buildings, detrimentally affects the adjacent community".[146] This illustrates that we cannot allow the individual interests of one owner trying to hold up development to create these widespread negative effects in the wider community. Hazel Easthope and her colleagues, also writing before the threshold in New South Wales was lowered, thought change was required to remove unanimous consent "to avoid the tragedy of the anticommons and enable the renewal of old properties and an increase in density in urban areas".[147] There is therefore support overseas for the lowered threshold, and for outcomes other than those based solely on individual preference satisfaction.

A key concern with changing the termination threshold is that it "erodes private property rights".[148] This is seen as a problem because owners purchase property in the belief that they will have ultimate control over it. If we recognise that private property creates social obligations, this no longer poses an issue. Private property is subject to some restrictions and an individual cannot be allowed to prevent progress or create deadlock because this will not always be the best outcome for the community. If we understand property as social and consider the interests of our neighbours and the obligations we owe to them, concerns around majority termination diminish. We cannot always let the individual win and acknowledging social ideas could allow us to consider other outcomes depending on the context.

In the example of cancellation, the individual concept of property may not allow the Act to achieve the best outcomes. A development cannot be successfully governed and managed if an individual can always hold up progress without consideration of other outcomes. By acknowledging that property is social, we can recognise the need to have a lower threshold. Our rights cannot be limitless, and we owe obligations to our neighbours which may include permitting them to take an action that we disagree with, but that is in the best interests of the community at large. There are still some safeguards, such as the minority objection process, to ensure the lower threshold does not result in unjust outcomes. The change in the cancellation threshold indicates a conceptual shift that I argue should continue into other areas.

### *B. Earthquake strengthening*

#### *1. Failure to provide for this in the Act*

[145] Cathy Sherry "Termination of Strata Schemes in New South Wales – Proposals for Reform" (2006) 13 Australian Property Law Journal 227 at 230.
[146] At 230.
[147] Easthope, Hudson and Randolph "Urban renewal and strata scheme termination", above n 6.
[148] At 1429.

A particular problem in this context is the fact that the Act does not contemplate or provide for the situation of a building in need of earthquake strengthening. This is a major end of life decision that more bodies corporate must face following the Canterbury and Kaikoura earthquakes, and is especially an issue in Wellington.[149] John Greenwood notes this particularly affects converted or heritage buildings,[150] and one might speculate older buildings have been converted into unit titles in Wellington, as they were in Christchurch (for example the Peterborough Apartments, built in 1920 as the Teacher's Training College, and converted into apartments in the 1990s).[151] The ability to apply to the court to settle a scheme under s 74, as discussed in Chapter Two, does not apply where damage or destruction is likely or anticipated but has not yet occurred.[152]

A body corporate may be required by law to strengthen the building.[153] The body corporate has a few options. First, they could hope that individual owners strengthen their units as required. However, the issues almost certainly impact more than a single unit and from an engineering perspective this is unlikely to work. The second option is to use provisions already present in the Act to try to levy funds, complete the work, and then recover the funds after the work is completed, but as noted by one submitter to the MBIE review, this is not a feasible approach for high-cost strengthening.[154] Levies can only be made based on utility interest,[155] and cannot be raised based on who will benefit from the work. Further, it might be difficult to fit the work within the body corporate's obligation to maintain and repair. Many owners will likely be against having to pay for something that does not directly benefit them, so will vote against it. Owners can also struggle to come up with the money and may not want the body corporate to borrow it.[156]

In a Tenancy Tribunal decision from December 2017, a group of owners living in townhouses unconnected to two buildings that needed earthquake strengthening were concerned about having to pay for work that did not impact them.[157] The effect of a levy for the costs of professional consultants to advise on the options and likely costs of strengthening apportioned on the basis of utility interests, and passed by the majority of owners, would not be unjust or

[149] Brookfields Lawyers "Earthquake Strengthening for Unit Title Properties" (4 April 2017) <www.brookfields.co.nz>.
[150] John Greenwood "Unit Titles Act: Lame duck and how to fix it" (paper presented to New Zealand Law Society Property Law Conference, Auckland, June 2016) 415 at 421.
[151] John McCrone "Saving the old: Some good news for Christchurch heritage buildings" (1 April 2017) Stuff <www.stuff.co.nz>.
[152] Toomey and others, above n 102, at 206.
[153] A territorial authority must issue an EPB notice for earthquake-prone buildings under s 133AL of the Building Act 2004, and the owner of a building or part of a building that is subject to such a notice must complete the work within a deadline specified in s 133AM.
[154] Redacted submission 98 "Submission on MBIE's proposed amendments to the Unit Titles Act 2010, December 2016" at 2.
[155] Unit Titles Act 2010, s 121.
[156] Jeremy Finn and Elizabeth Toomey "Condominium Chaos in the Wake of Disaster" (2017) 3 New Zealand Law Review 365 at 373.
[157] *Osmond & Ors v Body Corporate 82297* [2017] NZTT Wellington 9002481.

inequitable for the minority of townhouse owners according to the Tribunal.[158] This was because all of the owners were levied on the basis of a utility interest.[159] If later costs needed to be recovered from the unit owners impacted by the work, this could be done through s 126.[160] This dispute indicates the difficulties that can arise with using the levying approach to strengthening, as owners may dispute having to pay for the work.

The third option is for all owners to agree to the allocation of costs.[161] The body corporate will have to try to convince all of the unit owners that the earthquake strengthening is necessary.[162] If some unit owners refuse to engage, the process is hindered and reaching a decision can be impossible. Unanimity reflects the individual concept of property as it allows a single owner to hinder the process if they disagree.

This indicates a discrepancy in the Act. Much thought has been given to allowing effective governance and preventing a single owner from holding up repairs where there has been actual damage, and to ensuring that cancellation is permitted in the face of minority disagreement. However, the Act could be improved by providing for earthquake strengthening in a similar manner to the repair provisions. The process of levying can be difficult, and unanimity is too high a hurdle. Lack of a specific process may be an acceptable outcome for a single home, where the owner is only placing themselves at risk, their actions do not impact others, and there is no regulatory requirement to strengthen. However, the lack of provision for earthquake strengthening is not an acceptable outcome in a unit title development, where the lives of others, and their ability to live in the development, may depend on the strengthening work being done.

### *2. Remedying the omission*

If we stop considering the rights of an individual to deal with their property as they choose, and instead think about what will benefit the wider community, this gap in the Act could be filled. Adopting some targeted provisions to allow a body corporate to determine a process for earthquake strengthening could allow better outcomes. Possible provisions such as the ability to pass a special resolution to determine a strategy and a costs allocation based on which units benefit from the work, or allowing an application to the Court for a scheme as under s 74, could allow for the fair distribution of costs among the community and remove the current problems.

The individual concept at present is hindering progress and making decision-making difficult. If we view private property as intrinsically social and acknowledge that owners owe obligations

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[158] At [32].
[159] At [37].
[160] At [40].
[161] Redacted submission, above n 154, at 2.
[162] Greenwood, above n 150, at 421.

to others, it follows that a single owner should not be able to prevent progress. It also follows that the costs for strengthening can be apportioned among the unit owners based on the benefit to their unit. This is a better outcome than an individual shouldering all costs. The owners all benefit from the entire building being up to code and have the peace of mind of knowing their building is safe if repairs are undertaken. Targeted provisions could remove some of the issues. If individual owners can hinder the process, we run into issues of non-compliance, and delay work that is in the interests of the community.

We need to consider how we can empower bodies corporate to take the steps to protect their unit title developments and ensure their longevity without always having to get all owners to agree to a course of action. Acknowledging a social concept of property will allow people to acknowledge that they owe obligations to their neighbours and need to factor in this scenario. While the individual model can work for fee simple property in many situations, considering the community is crucial in a unit title.

### *C. Conclusion on end of life decisions*

Acknowledging the social concept of property in relation to cancellation can allow the Act to achieve better outcomes and avoid the risk of ineffective management associated with the individual concept. Recognising that property is relational and necessarily involves interactions between neighbours affirms the need to provide mechanisms to allow the community to effectively make decisions and prevent the situation of deadlock. The will of the individual cannot always prevail. Instead, consideration of what is just in the context of community can produce better outcomes.

While some end of life decision-making has been provided for in the instance of cancellation, extending this to earthquake strengthening could further facilitate decision-making. The alternative social concept realises that this community must work together to manage their development. An individual concept would not produce the best outcomes here. The incorporation of the social concept of property in the Act allows for development and progression without issues of holdout, and further acknowledging the alternative concept could allow for effective decision-making in the future.

## *IV. Chapter Four – Body corporate operational rules*

The final example of body corporate operational rules also demonstrates how the social concept can lead to better outcomes and justify regulating some use of the development. However, this example also indicates that the social concept cannot go so far to allow unjust incursions on individual autonomy.

### *A. Power to make rules*

A body corporate has the power to make operational rules governing certain aspects of the use of the property. As I will discuss, these rules are often used to cover situations such as the ability to have pets in the development, or to hang laundry from the exterior, in order to prevent one owner's use from harming others. It is mandatory to have such rules at all times.[163] Default rules are prescribed in sch 1 of the Unit Titles Regulations 2011. These rules will apply if the original owner (the developer) does not deposit altered rules with the unit plan.[164]

The default rules prevent damaging, defacing and littering the common property, prevent creating noise likely to interfere with the use or enjoyment of the development, regulate parking on the common property and prevent interfering with the reasonable use and enjoyment of the common property by other owners or occupiers.[165] An owner or occupier must also dispose of rubbish hygienically and tidily.[166] These rules can be enforced by both the body corporate and unit owners.[167]

The rules can be amended, revoked or added to by the body corporate, and are binding on the body corporate, a principal unit owner, an occupier of a principal unit and a mortgagee in possession of one.[168] A principal unit owner has the right to enforce these rules, and a corresponding obligation to comply with the rules.[169]

#### *1. Rules under the Unit Titles Act 1972*

The ambit of the rules under the previous Unit Titles Act 1972 was much wider than it is today. The previous Act seemed to place greater weight in favour of the rights of an individual to manage their property how they wish by allowing the body corporate to make much wider changes to obligations of unit owners than are now permitted. The rules under the 1972 Act

[163] Unit Titles Act 2010, s 105(1).
[164] Section 105(2).
[165] Unit Title Regulations 2011, sch 1 cl 1.
[166] Schedule 1 cl 2.
[167] Tenancy Services "Body Corporate Operational Rules" <www.tenancy.govt.nz>.
[168] Unit Titles Act 2010, s 105(3) and (4).
[169] Sections 79(g) and 80(1)(j).

were "all powerful".[170] By comparing the previous legislation to the 2010 Act, the shift to the social concept in the latter legislation is apparent.

The rules in sch 2 of the 1972 Act related to the duties of a proprietor, such as to allow entry of the body corporate into units, and to repair and maintain their unit to ensure no harm to the common property or other units.[171] Schedule 2 of the 1972 Act also addressed the powers and duties of the body corporate, including duties of maintenance and repair, and management of funds.[172] The latter part of the schedule addressed procedural body corporate matters.[173] The rules in sch 2 could only be changed by a unanimous resolution,[174] giving some protection and ensuring a rule change would only take place if everyone agreed. Nonetheless, this process allowed significant alteration of the duties in key areas such as maintenance.[175]

The default rules now contained in the 2011 Regulations are similar to the rules contained in sch 3 of the 1972 Act. This indicates Parliament determined which areas were suited to remaining in the default rules and altered them accordingly.

### *2. Unit Titles Act 2010 – a shift in focus*

There has been a shift to ensure matters such as repair and maintenance, as well as procedure, are codified in the Act and cannot be altered. The previous rules contained in sch 2 of the 1972 Act regarding maintenance and repair are now found in the main provisions of the 2010 Act, meaning they cannot be altered except by legislative process. As noted in the Background Report to the Select Committee on the Bill that became the 2010 Act, this change "recognises that there are fundamental parameters within which a body corporate and unit owners must operate".[176]

This different approach acknowledges that owners owe obligations to their neighbours and ensures that certain individuals cannot try to influence others to grant rules in their favour in the area of repair. Rather, the legislature has recognised that certain governance matters are crucial to the effective management of the unit titles, and in the interests of the community has limited the matters that can be addressed in the rules.

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[170] Bruno Bordignon and others "Seminar: The Unit Titles Act 2010" (July 2011) at 45.
[171] Unit Titles Act 1972, Sch 2 cl 1(a) and (f).
[172] Schedule 2 cls 2 and 3.
[173] Schedule 2 cls 4–34.
[174] Unit Titles Act 1972, s 37(3).
[175] Though this was subject to some restrictions contained in the previous s 37, such as amendments having to relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act) under s 37(5), as under the 2010 Act.
[176] Department of Building and Housing *Background Report to the Social Services Select Committee on the Unit Titles Bill* (May 2009) at 14.

Section 106 governs amendments, revocations and additions to the rules. Any such change:[177]

> must relate to:
> (a) the control, management, administration, use, or enjoyment of the principal units, future development units, accessory units, or common property; or
> (b) the regulation of the body corporate.

Powers or duties cannot be conferred on the body corporate unless they are incidental to the powers and duties already present under the Act.[178] "Incidental" has been interpreted widely, and involves looking to the nature and characteristics of the complex.[179] Changes can be made by an ordinary resolution at a general meeting,[180] requiring a majority of those who vote on the resolution to vote in favour of it.[181] These provisions appear to grant relatively wide discretion to bodies corporate to determine what rules they want in their unit development. However, the discretion has been significantly reduced when compared to the previous Act. While the body corporate can make rules regarding use of the property (such as regulating pets and the aesthetics of the exterior), the core repair and maintenance provisions are codified in the body of the statute.

The body corporate has quite wide powers to make rules for governing the development. The powers are an indication of the recognition of the importance of governance in this type of property interest, and perhaps acknowledgment by Parliament that for a community to be successful, some self-regulation can be of assistance. This aligns with the conclusions of Elinor Ostrom in *Governing the Commons*,[182] and illustrates that complete governmental control of property interests is not the only option to allow property interests to prosper. It is important to note, however, that some authors do not see this rule-making power as so positive, as I will discuss.

It is clear that any rules inconsistent with the Act will be invalid,[183] ensuring that certain rights and obligations cannot be compromised. By allowing changes in relation to the units and the common property but ensuring that the core rights and obligations are fixed, a balance has been struck between the rights of individuals and of the community. The community has some control over the rules which govern their development, but not over areas crucial to the effective governance of the community.

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[177] Unit Titles Act 2010, s 106(1). This is similar to the requirement under s 37(5) of the 1972 Act, except rule changes can no longer relate to the powers or duties of the body corporate.
[178] Section 106(2).
[179] Fry-Irvine, above n 97, at 130.
[180] Section 106(3)(a).
[181] Section 97(4).
[182] Elinor Ostrom *Governing the Commons* (Cambridge University Press, Cambridge, 1990).
[183] Section 106(4).

## *B. Outcomes under individual and social concepts of property*

Exploring some specific examples of the application of body corporate rules demonstrates how the different concepts of private property lead to different outcomes.

### *1. Pets*

One area that body corporate operational rules often cover is pets. The case law indicates that rule changes regarding pets (initially allowing pets and then banning them) are permitted and are not ultra vires.[184] In one case, the Tenancy Tribunal ordered a couple to remove two beagles as the rules prohibited pets except for assistant dogs.[185] However, it is hard to see how smaller dogs could really impact on the development in an overly negative way. On an individual view, it is impermissible that the development could prevent someone having a pet in their unit, as that is their individual choice to make about their private property.

A social concept of property might justify these rules. For example, a dog with a loud bark could have a negative impact on neighbours, and part of the relational nature of this property could be an obligation not to unnecessarily disturb other owners. In one case, an owner had a spaniel and a Rottweiler in a development which prohibited animals and birds without the body corporate's consent, and it was agreed the Rottweiler would be removed as it was intimidating.[186] This seems a more reasonable application of the rules, as it is allowing pets to the extent that they do not interfere with others' use of the property.

### *2. Airbnb*

Another example is the ability to use one's unit as an Airbnb property. In Australia, it is generally accepted that a by-law preventing an owner from leasing out their unit as an Airbnb property would be ultra vires as it would unduly interfere with individual use of the property.[187] Thomas Gibbons notes this is also the preferred position in New Zealand, with there being no ability to use the rules to prevent leasing for short term stays.[188] However, transient and noisy guests can create a large disturbance, with problems such as renters leaving loudly every few days at 4am, or partying every Saturday.[189] There may come a point where the interests of the community in having stable ownership, and peace and quiet, outweigh the individual desire to generate income from letting out their unit for short-term stays. In the future as this use of

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[184] See for example *Godoy and Godoy v Body Corporate 164980* HC Auckland M1906/98, 14 June 1999 as cited in Fry-Irvine, above n 97, at 137.
[185] *Plata Trustee v BC 422626 and Queenstown Management Limited* 14/00184/UT – 24 June 2015 as cited in Fry-Irvine at 137.
[186] *BC 84891 v Panich and Vallant Hooker Trustees Ltd* 14/00011/UT – April 2014 as cited in Fry-Irvine at 137.
[187] Toomey and others, above n 102, at 47.
[188] Thomas Gibbons "From Housing Law to Airbnb" (2018) 916 LawTalk 24.
[189] Toomey and others, above n 102, at 47–48.

property becomes more common, and the effects more negative, this may be an area that bodies corporate see fit to regulate, and that the courts could approve of.[190]

### *3. The exterior*

Another common area governed by the operational rules is the appearance of the exterior of the building. While an owner will be unable paint the exterior of the building (since this falls within the building elements and is controlled by the body corporate) further restrictions on the aesthetic appearance of the building can be imposed by the rules.

Many bodies corporate have rules about hanging washing from the exterior of the building. For example, in the body corporate rules governing 60 Willis St in Wellington, there is a rule prohibiting a unit owner or occupier from hanging any washing (including bedding and clothing) or constructing any clothesline from the exterior of the building.[191] Another example is an apartment block in Newtown, Wellington, with a rule prohibiting erecting, installing, or placing any clothes drying apparatus on any part of the balconies or windows.[192] Using the exterior of the building in this way could interfere with other owners, since it can impair the aesthetic qualities of the whole development. Preventing this can ensure the development maintains a certain appearance. These rules indicate that the importance of the whole building appearing presentable can take precedence over an individual wanting to hang their washing off the building.

In theory, bodies corporate could also use these rules to cover erecting a flag outside one's unit. While laundry is generally accepted to be an eyesore, we run into greater difficulties if we attempt to regulate acts of self-expression. If a New Zealander wanted to hang an All Blacks flag from their balcony, but the rules contained a provision preventing the fixture of anything to the exterior of the building, would we allow this rule to stand? This was an issue in Nebraska where Donald Lamp, the father-in-law of a Supreme Court judge, was ordered to remove an American flag he had hung outside his balcony due to a rule against external adornments.[193]

Under an individual concept, an owner should be able to use their private property to express themselves as they choose. Lamp's neighbours believed they had bought a stake in a community, and with this comes the ability to regulate the use of units and the development's external appearance.[194] However, limiting acts of self-expression that can hardly be said to

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[190] Gibbons "From Housing Law to Airbnb", above n 188, notes a recent Privy Council decision, *O'Connor v The Proprietors, Strata Plan No.* 51 [2017] UKPC 45, which suggested a rule could restrict short stays.
[191] Body Corporate 88925 Operational Rules (2014) <http://60willis.co.nz> at 10.
[192] Body Corporate 34850 Operational Rules <http://property-plus.co.nz> at 4.
[193] Joseph Singer "How Property Norms Construct the Externalities of Ownership" in Gregory Alexander and Eduardo Penalver (eds) *Property and Community* (Oxford University Press, New York, 2010) 57. Singer notes that in 2006, Congress passed a law protecting the right of owners to display the American flag.
[194] At 59.

have any real adverse effects appears to be an unjust use of the powers. The social concept of property can acknowledge the need for owners to cooperate, and to not undertake uses of the property that may have adverse effects, but this cannot go so far as providing an unfettered discretion and damaging other human capabilities such as self-expression.

*4. Tensions*

All of these illustrations provide examples of the fine line between allowing regulation of the unit title development, and restricting use. The examples above demonstrate that the social concept of property has prevailed as an individual cannot use their unit with no limitations, and the use of the property can be regulated to ensure that one owner will not impair the community. However, some regulation over acts which cannot be said to harm others may go too far and unduly restrict autonomy, even taking into account the social aspects of unit title ownership.

Cathy Sherry understands the justification for limiting actions which have the potential to adversely affect others, but believes "the right to regulate behaviour that has no effect on others cannot be so justified".[195] Sherry asks, "[d]o we want to live in a community where people's intolerance of occasionally having to share a lift with a dog or hearing children play is given legal legitimacy"?[196] The legislation in New South Wales that Sherry is discussing is very similar to ours. By-laws in New South Wales can be made in relation to the "management, administration, control, use or enjoyment of the lots or the common property and lots".[197]

Sherry notes that it is self-evident that land use will be regulated today, but this regulation should go "only so far as our activities have the potential to harm others".[198] Sherry says that this regulation is usually public, and if there is no harm to others, then "there is a sphere of private property that remains free from the interference of government, neighbours, landlords and family".[199] In her view, the issue with the power to make by-laws is that "it violates the principle of negative liberty and the sanctity of the home by allowing the regulation of behaviour *inside* people's homes which does not affect others *at all*, or does not affect them *in any meaningful way"*.[200] She is advocating for aspects of the individual concept, reverting back to the dominant view of private property as being to restrict interference with individual liberty.

Sherry notes, in relation to Queensland case law on by-laws banning pets, that "it is obvious that the essence of all disputes is negative liberty and the discomfort both residents and

[195] Sherry "Lessons in Personal Freedom", above n 26, at 310.
[196] At 312.
[197] Strata Schemes Management Act 2015 (NSW), s 136.
[198] Sherry *Strata Title Property Rights,* above n 70, at 178.
[199] At 178.
[200] At 179.

decision-makers have with the regulation of self-regarding behaviour".[201] She is also concerned that allowing such rules will run "the very real risk of fostering intolerance".[202] She argues that there should be a "default rule that by-laws cannot regulate activity inside lots unless the activity has a meaningful and harmful effect on others," and that such a rule "would be consistent with the most basic principles of liberal democracy".[203]

Sherry is concerned with the implications that can follow from having by-law making powers which are unfettered and impede individuals' use of private property. If people are to enjoy their property, these restrictions cannot go too far. While the scope of powers in New Zealand is limited due to the codification of core provisions in the 2010 Act, these provisions may still give too much power to the community to limit individual property use. If rule-making powers are unfettered, and too many restrictions can be imposed, people will not want to enter into these communities and will try to purchase a fee simple instead, thus undermining the current drive towards higher-density living.

Perhaps an even better example of this concern is Sherry's description of the rules surrounding children. Sherry notes that we care about human flourishing.[204] She argues that "the exercise of property rights should never seriously compromise the well-being of others",[205] and explores this idea through the example of by-laws prohibiting children playing on common property.[206] Sherry gives examples of by-laws in developments in Australia which had the capacity to compromise and limit children's play on the land.[207] In effect, owners are creating these rules, and only considering their desire to have a quiet development, rather than the wider effects limiting play could have on these children. Sherry says that strata legislation "empowers private citizens, with no planning or other expertise, to write rules regulating children's play spaces with no reference to children's well-being".[208] Sherry argues "we must be attentive to the externalities caused by the exercise" of the right to regulate common property, and the harmful effects that can follow.[209] She regards the restriction of children's play as unjustifiable property practice,[210] and suggests limiting the powers by creating a requirement of reasonableness.[211]

Consideration of Sherry's discussion indicates that the social concept cannot go so far as to justify all rules. This quasi-legislative regulation can be unjustifiable when it takes the rules beyond limiting harmful or adverse effects and encroaches unreasonably on autonomy.

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[201] At 182.
[202] At 183.
[203] At 190.
[204] At 198.
[205] At 198.
[206] At 207.
[207] At 213.
[208] At 214.
[209] At 220.
[210] At 220.
[211] At 233.

Recognising the wide powers that we have granted to bodies corporate could indicate the need to place some more limits in the Act. Acknowledging the wider goal of property as flourishing indicates that while we need some cooperation and may need to limit certain actions to the extent that this will benefit the wider development, we also cannot place such limits so as to restrict autonomy unduly and in effect reduce flourishing. Autonomy is a requisite of flourishing, and in order to make unit title developments an attractive private property alternative that can meet the growing need for it, we must consider how we can facilitate well-being.

### *C. Conclusion on rules*

Despite Sherry's concerns, I still see value in allowing regulation of these communities and permitting owners to tailor the use of their development, so long as the powers are not taken so far as to restrict acts with no wider effects. The Act seeks to balance the importance of individual autonomy with the reality that, in this context, every owner owes obligations to their neighbours. While a focus on self-preference could lead to conflicting uses of property, and disagreement among neighbours, acknowledging the social concept of property can allow effective governance and management of unit titles because it assists with regulating use of the property for the benefit of the community.

Currently, there are mechanisms available for some relief if the rules produced are unfair. If an owner voted against a rule, and sees it as unfair or inequitable, they can apply to the Tenancy Tribunal or courts for relief.[212] There are also model rules available from the Auckland District Law Society for different types of developments if bodies corporate require a starting point.[213] However, going further and adopting Sherry's proposal of reasonableness could ensure restrictions of use do not go too far. A reasonableness requirement could also achieve a balance between allowing autonomy and restricting uses that could have a negative impact on the wider development.

Regardless of whether one considers the current powers too broad, their presence in the legislation is further evidence of the presence of the social concept of property in the Act. The Act recognises that owners may owe obligations to temper the use of their property in the interests of their neighbours and co-owners and gives the body corporate the power to regulate the operation of the development in a manner that is aimed at benefiting the best interests of the development as a whole.

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[212] Tenancy Services "Body Corporate Operational Rules" <www.tenancy.govt.nz>.
[213] Liza Fry-Irvine and Thomas Gibbons "Unit Titles Act 2010 – reading between the lines" (paper presented to New Zealand Law Society Property Law Conference, Wellington, June 2012) 17 at 38.

## *Conclusion – Why the social concept of property may lead to better unit title outcomes*

A focus on an individual concept of property may prevent the Act from achieving the best outcomes for unit titles. Shifting to acknowledge and further incorporate a different idea of the social concept of private property in the Act may allow for more successful governance of communities of owners. This can only be beneficial for this kind of land ownership, where we are dealing with multiple and varied owners ranging from the elderly to first-time owners and have to come up with solutions to fit this alternative form of property.

Under the dominant view of private property, property's role is to protect individual autonomy and allow for preference satisfaction. While this model may work to an extent in the classical illustration of a dwellinghouse on a single plot, applying it would not be ideal in the context of unit titles. Easthope and Randolph have recognised the need in Australia to puncture the illusion of a unit title being akin to a standalone dwelling. I argue that this is also the case in New Zealand. Continued focus on the misconception of unit titles as individual property will not result in the best outcomes. If every unit owner used the property as they chose without consideration for their neighbours, there would be constant disagreement over responsibilities and use of the property.

I have been advocating for the idea that by recognising an alternative tradition which views private property as social and allowing for the broader goal of flourishing, we can create a scheme for the management of unit titles that will produce better outcomes. Rights and obligations can be clearly allocated, important decisions can be made without problems of holdout and communities can self-regulate to an extent. Acknowledging the social concept of property indicates that there are other options beyond always allowing individual self-preference to prevail. Instead, we can consider the wider community and manage developments to produce fairer outcomes that consider the range of interests present in a unit development.

An alternative concept can account for the allocation of responsibility for certain repairs to the body corporate. It can also produce fairer outcomes by sharing costs among the whole development. The social concept of property can justify the shift to a lower cancellation threshold. While Ms Petherbridge may disagree, this can produce the positive consequences of facilitating redevelopment and a new life for unit developments. Acknowledging this concept can indicate the need to assist the body corporate with earthquake strengthening decisions. Finally, I argue that in relation to rules, the social concept of property can justify some regulation to allow for the well-being of the development. However, I also acknowledge that this concept cannot justify all rules.

Sherry has said that handing quasi-legislative rule-making powers over to bodies corporate can unduly infringe autonomy, and I agree to an extent. If property is to achieve the goal of flourishing, there must be the ability to both pursue autonomy and other goals such as sociability and community. In my view, the role of the individual is not the only position we must consider. The social concept of property indicates that self-preference should not always be the solution, and we can try to reach better outcomes by determining what is just for the whole community. By choosing to limit the sorts of rules that can be made, we can ensure that the individual preference of one owner in the development does not prevent the rest from flourishing and vice versa.

Currently, MBIE are undertaking a review of the Act. This review, with the presence of the idea of community, contains some acknowledgement of alternative ideas. I believe that acknowledging these social ideas further, and perhaps adopting some of the changes that I have suggested, could allow us to frame the legislation in New Zealand in a way that will allow it to create well-functioning developments into the future. Further acknowledging the social concept of property in any changes to the Act, and in any other consultation documents, can begin the educational shift that Easthope and Randolph advocate for, and may allow what we see to be what we get. Addressing the misconception could allow for the successful operation of unit developments so they can meet the growing demand for multiple-owned property.

We need to be sure that purchasers realise what they are buying, and that the realities of a unit title are reflected in our legislation. The individual concept is not the only taxonomy, and other concepts, as well as other forms of ownership, exist. Recognising the presence of both individual and social ideas in the Act allows us to see some potential issues with the focus on the individual and understand how property creates social obligations. While this may seem negative to an owner who desires the Lockean model, under Alexander's concept, being part of a community due to the relational nature of property can enable both people and property to flourish.

The framework for governance and management of these developments must be able to operate effectively and provide solutions to issues when they arise. Continuing to focus on the individual model will not always give the best answers. The individual concept would create government and management provisions that, while effective in managing a single house, cannot translate effectively into the unit title sphere. We should not be so quick to assume that property will fit the individual model. Recognising the possibility for alternative concepts of property, and therefore alternative outcomes that can enable flourishing, can produce better outcomes for communities of unit title owners. Owners and buyers may then see unit title ownership for what it truly is: intrinsically social.

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