

THE NUMERUS CLAUSUS PRINCIPLE IN CONTEMPORARY AUSTRALIAN PROPERTY LAW

BRENDAN EDGEWORTH*

The numerus clausus principle is one of key metaprinciples of the property law of common law systems. It refers to a 'closed list', or a set menu, of finite types of property rights. In land law, it limits the number to less than a dozen comprising the estates, the servitudes and the security interests. The rationale that underpins this metaprinciple is the idea that by simplifying the range of rights, it is easier for prospective purchasers to discover how rights over land have been fragmented. This article examines the contemporary application of the numerus clausus principle in recent Australian case law. It argues that while historically it may have operated to impose an optimal standardisation on the number of property rights, it now unduly restricts the development of property law. The basic reason for this is that cheap and efficient registration systems have substantially removed the problem the numerus clausus principle was originally meant to solve. These systems not only make it comparatively easy to discover idiosyncratic packages of rights over land, but it forces those who create them to register if they are to be enforceable against third parties.

I INTRODUCTION

In recent years Australian courts have offered emphatic affirmation of a fundamental policy underpinning the property law of all common law jurisdictions. Conventionally described as 'the *numerus clausus* principle'¹ – in English, the 'closed list' principle – it expresses the stringency of the common law's approach to property rights, particularly over land.² In essence, the principle holds that landowners are not at liberty to customise land rights, in the sense of re-working them in an entirely novel way to suit their particular individual needs and circumstances. Rather, any new rights must fit within firmly established pigeonholes, of which the law permits only a small and finite number. The principle applies regardless of the terms of any agreement that parties might reach for the purpose of creating such an interest, so it is irrelevant that a specific contractual arrangement to create a wholly novel interest might be free and fair. It is also quite beside the point that the objectives expressed in that agreement

* Associate Professor, School of Law, University of New South Wales.

¹ John Henry Merryman, 'Policy, Autonomy, and the *Numerus Clausus* in Italian and American Property Law', (1963) 12 *American Journal of Comparative Law* 224-31; William Swadling, 'Opening the numerus clausus' (2000) 116 *Law Quarterly Review* 354.

² Though most commonly referred to as a principle governing land law, it also applies to other forms, such as intellectual property. See, eg, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 509 (Dixon J). The focus of this paper is confined to land law.

might be mutually convenient, highly desirable or economically efficient. In this respect, property law is highly prescriptive: the system of rights *in rem* is a strictly circumscribed one, with a tight regulatory regime governing the range and form of available rights over land.

By contrast, parties may agree to bind themselves *contractually* to any type of arrangement of rights and responsibilities. Contract law, with its inbuilt principle of free exchange, displays none of the restrictiveness of property law when confronted with new packages of rights. In only the most extreme circumstances, such as where the contract involves illegality, will contractual provisions be struck down. In the celebrated pronouncement of Lord Brougham LC in 1834, in the case of *Keppell v Bailey*, contract law allows parties 'the fullest latitude' when formulating rights and obligations as between themselves over real and personal property.³ Property law adopts a very different approach; for it is concerned not so much with rights between parties to agreements, as with those rights that are capable of binding third parties. Accordingly, the *numerus clausus* principle prevents rights that do not fit neatly into the recognised categories of corporeal and incorporeal hereditaments from entering the pantheon of proprietary interests. A clear doctrinal gulf therefore separates property and contract: expansive freedom of contract allows parties to fashion rights over land at will, while property narrowly limits the kinds of rights that may attach to the land so as to bind successors in title.

This paper will outline the origins of the principle in 19th Century English case law, as a prelude to an analysis of the general policy considerations that inform it. The paper will then critically examine the relevance of the doctrine to contemporary land law. Finally, the paper will chart how recent Australian case law in the areas of licences, freehold covenants, easements and profits à prendre demonstrates the principle at work in all its rigidity. My general argument is that the strictness of the common law approach to recognising new interests in land is eminently defensible in a regime of old system, or common law, conveyancing, given the inefficiencies that intrinsically afflict it, and the attendant difficulties faced by third parties when seeking to discover all relevant interests affecting land. In this context, the *numerus clausus* principle has represented a valuable boundary rule for property law, allowing a fixed, yet moderate, number of estates and interests to exist. To put this point in the language of economists, the principle can be seen as one that has advanced the policy of 'optimal standardisation' of property rights.⁴

But for all it is worth from an historical perspective, I will argue that that particular rationale for the principle is growing obsolete. It loses a great deal of

³ (1834) 2 M & K 517 at 536; 39 ER, 1049.

⁴ Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 69.

its force where interests in land are established and protected by means of recordation on state-owned registers of land titles. Where those registers operate effectively, by containing a complete record of interests, and prove easy and cheap to access, the less need there is for a strictly delineated *numerus clausus*. Furthermore, different forms of registers operate with different degrees of efficiency and user-friendliness. Their relative strengths in these respects will be compared. The general conclusion I reach is that to the extent to which different land title registers displace – from lesser to greater degrees – the general law doctrine of notice, the case for the *numerus clausus* principle in its present form is progressively weakened, and that the present number of allowable property interests has become significantly, and increasingly, ‘sub-optimal’.

II THE NUMERUS CLAUSUS PRINCIPLE: ITS NATURE, ORIGINS AND POLICY BASIS

According to Bernard Rudden, the term *numerus clausus* refers to ‘a restricted list of entitlements which [the law] will permit to count as property interests, or “real rights”’.⁵ In a lengthy comparative study, he found that virtually all modern, that is to say, post-feudal, legal systems operate with a closed list of recognised proprietary rights. Civil law jurisdictions are marked by this foundational arrangement no less than the common law systems. Rudden identified ‘less than a dozen’ categories of entitlement to land.⁶ They are those that confer possession, namely the estates: the fee simple, the life interest, and the leasehold. Then follow interests often referred to collectively as the ‘servitudes’, such as easements, profits, and restrictive covenants.⁷ Finally, come the security interests: mortgages and other charges. To rank as an interest in land, a right must come within one item on this menu of interests. If not, it will fail to be enforceable as property; and that means it will be impotent against successors in title, even if they have full knowledge of its existence at the time they acquire their interest.

The same closed list is roughly applicable in Australian law. So, the fullest interests in land, conferring possession of the land for various periods of time, from the infinite all the way down to the short fixed-term, are the estates: fee simple, life estate and leasehold.⁸ Then follow the lesser interests: easements, freehold covenants and profits, and finally the security interests, such as mortgages. A parallel measure of the breadth of the *numerus clausus* is evident in recent case law where courts have been offered the opportunity to particularise these interests in the context of interpretation of statutory provisions that refer to

⁵ Bernard Rudden, ‘Economic Theory v Property Law: The Numerus Clausus Problem’ in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence* (1987) 239, 239.

⁶ *Ibid* 255.

⁷ This practice derives from Roman law, and is common in the United States: *ibid* 242.

⁸ Note that in South Australia, Tasmania and Victoria dinosaurs may still stalk the earth in the form of the fee tail: *Estates Tail Act 1881* (SA); *Land Titles Act 1980* (Tas) s113; *Property Law Act 1958* (Vic) ss 250 and 251.

'interests in land'. In *Hornsby Council v Roads and Traffic Authority of NSW*,⁹ Meagher JA concluded that the phrase 'any interest in land' contained in section 4 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), which was further defined in the section to mean '(a) a legal or equitable estate or interest in the land, or (b) an easement, right, charge, power or privilege over, or in connection with, the land' encompassed to the following list:

Whilst the rights which fall within par (b) must be wider than the rights which fall within par (a), I feel that they must be limited jura in re aliena, proprietary or quasi-proprietary rights less than a fully-fledged estate, that is, easements, charges, profits à prendre, profits à rendre,¹⁰ licences coupled with interests, etc.¹¹

This finite list means that, for example, contractual licences cannot qualify as proprietary interests.¹² Nor can such rights as a *ius spatiiandi* (a right to wander over another's land) assume the status of property,¹³ or a right to unobstructed television reception.¹⁴ And despite the tantalising 'etc' appended to Meagher JA's catalogue of property rights in the above quote, it has not been found in later cases to connote that the category of property rights is one of 'indeterminate reference'.¹⁵ Importantly, the *numerus clausus* principle operates in two distinct ways: not only does it withhold recognition of completely new interests, but it also polices the boundaries of existing interests to prevent expansion to include new types of rights. The reasoning of Bryson J in the recent case of *Clos Farming Estates v Easton* captures in summary form the cautionary approach adopted by judges. Only where novel rights can be characterised as 'close analogies' of earlier rights will they be acceptable, novel versions of the traditional categories.¹⁶

Although it is usually characterised as a 'principle', the *numerus clausus* is perhaps better described as a 'metaprinciple' insofar it operates as a higher-order norm of land law, governing the general development of the more specific guiding principles in particular regions of land law such as easements, profits, leases and so forth. As Kevin Gray and Susan Francis Gray put it, the jural status of these metaprinciples in the sphere of property law lies in their representing

⁹ (1997) 41 NSWLR 151, 155

¹⁰ The profit à rendre appears because of its apparent recent rediscovery in a number of New South Wales decisions. See, eg, *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426; *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd* [2005] NSWCA 251. See also *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315; *Rakus v Energy Australia* [2004] NSWLEC 657; *Tanner v Minister of Education and Training* [2002] NSWLEC 40; *Mooliang Pty Ltd v Shoalhaven City Council* [2001] NSWLEC 83; *Kanak v Minister for Land and Water Conservation* [2000] FCA 1105; *Clos Farming Estates Pty Ltd v Easton* (2002) 11 BPR 20,605. For a discussion of this interest, see Brendan Edgeworth, 'Profits à Rendre: A Reincarnation?' (2006) 12 *Australian Property Law Journal* 200.

¹¹ *Hornsby Council v Roads and Traffic Authority of NSW* (1997) 41 NSWLR 151, 155 (Meagher JA).

¹² *King v David Allen & Sons, Billposting* [1916] 2 AC 54; *Ashburn Anstalt v Arnold* [1989] Ch 1.

¹³ *A-G v Antrobus* [1905] 2 Ch 188; *Randwick Corporation v Rutledge* (1959) 102 CLR 54.

¹⁴ *Hunter v Canary Wharf Ltd* [1997] AC 655.

¹⁵ *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd* [2005] NSWCA 251. The expression 'indeterminate reference' comes from the work of Julius Stone: see, eg, Julius Stone, *Legal System and Lawyers' Reasoning* (1964) esp ch 7.

¹⁶ (2001) 10 BPR 18,845, [26].

a collective professional *mentalité* – a cluster of inner convictions, predispositions, and ways of looking at problems – which then overhangs the practical implementation of the relevant rule system... It should, accordingly, come as no surprise that the propositional structure of English land law is ultimately influenced – even dictated – by a number of principles of generalised or idealistic content whose origin lies outwith the formal organs of law... The metaprinciples of real property ... operate as an extra (and highly informal) source of foundational, value-laden precepts, emerging not as arbitrary *fiats* within some logical scheme, but as the collectively determined product of interactive rhetorical engagement within a college of expert opinion.¹⁷

This ‘college of expert opinion’ pervades the wide landscape of legal discourse in property law, as evidenced in judicial pronouncements, in legislation, in law reform commission reports, and in academic commentary. It functions to inform implicitly, but no less directly, the development of specific legal rules, as we will see below in an examination of recent Australian case law. Its influence is felt across the entire range of the various proprietary interests, from estates to security interests.

From a different perspective, Thomas Merrill and Henry Smith provide a parallel analysis of the function of the *numerus clausus*. They see the operation of the principle as an example of ‘a norm of judicial self-governance’ by means of which judges instinctively impose a limit on the number of interests capable of existing on the property menu, leaving the legislature with the exclusive power to create novel interests in property:

Yet notwithstanding the absence of any logical compulsion behind the *numerus clausus* in common-law systems, it is reasonably clear that common-law courts *behave* toward property rights very much like civil-law courts do: They treat previously-recognised forms of property as a closed list that can be modified only by the legislature. This behaviour cannot be attributed to any explicit or implicit command of the legislature. It is best described as a norm of judicial self-governance. Jurisprudentially speaking, the *numerus clausus* functions in the common law much like a canon of interpretation... or like a strong default rule in the interpretation of property rights.¹⁸

It would be a mistake to see these metaprinciples or higher order norms as being completely separate from the specific rules of land law evidenced in the case law. In many instances, they may be large, generic principles which have had their origin in a specific judicial pronouncement in a particular case, and which have

¹⁷ Kevin Gray and Susan F Gray, ‘The Rhetoric of Realty’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003) 204, 235-7. It is important to note that the authors do not include the *numerus clausus* as part of their own catalogue of ‘metaprinciples’, even though they refer to it as part of ‘the closed nature of the axiomatic system’ of land law (at 210). Accordingly, I am using the term in a somewhat broader sense than they do.

¹⁸ Merrill and Smith, above n 4, 10-11 (emphasis in original).

at a later stage gained general acceptance across the field of practitioners and commentators. The *numerus clausus* is a typical instance of this process at work.

One of the earliest, and most influential, expressions of this particular metaprinciple appears in the judgment of Lord Brougham LC in *Keppell v Bailey*.¹⁹ This case involved a covenant made by the lessees of ironworks to the owners of a railroad and quarry, for themselves, their successors and assigns. The covenant declared that as long as they remained in occupation of the land they would buy all their limestone from the quarry, carry the limestone along the railroad and pay a toll for doing so. The owners of the railroad sought to enforce this covenant against an assignee of the ironworks. The assignee had purchased with notice of the covenant. Lord Brougham LC refused relief on a number of grounds, but most relevantly in this context, he held that this right was not of a kind capable of binding the land.

His Lordship approached the matter by providing what he considered to be a comprehensive list of all the rights over land recognised by the common law. These were the now familiar categories of rights to possession of the land, namely, estates of freehold and leasehold, and those lesser interests which conferred rights on the land short of possession such as easements, and other incorporeal hereditaments such as rentcharges.²⁰ The right in question in this case could not be squeezed into any of the items on this list. His Lordship concluded that although it was perfectly acceptable for the parties to bind themselves contractually to this arrangement, it would be contrary to public policy to allow them to change the character of the land by such an agreement, so as to bind all persons not party to it:

It must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given'.²¹

The passage that articulates the detailed rationale for this metaprinciple is worth quoting in full, given its enduring and pervasive influence on the property law of common law jurisdictions:

but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every message, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his message and land to take

¹⁹ (1834) 2 My & K 517, 39 ER 1042.

²⁰ Ibid 535-6, 1049.

²¹ Ibid 535, 1049.

lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised.²²

Notably, 'fancy' and 'caprice' are perfectly permissible expressions in law of contractual freedom, and will be protected by relevant legal remedies in the event of breach. In relation to this policy, Lord Brougham concluded that '[t]here can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow'. But parties to a contract will not be allowed to impose those preferences on the use of land.²³

This principle was affirmed in the later case of *Hill v Tupper*.²⁴ In this case, a canal proprietor granted the plaintiff a lease for seven years of a parcel of land adjoining the canal wharf. The lease also gave him sole and exclusive rights to put boats on the canal and hire them out. The defendant, an innkeeper, also kept boats, and hired them out for use on the same part of the canal. The plaintiff sued the defendant in trespass. The canal proprietors were not parties to the action. The Court of Exchequer held that the lease did not create any estate or interest in the plaintiff that might enable him to maintain an action. It declared invalid the easement purporting to grant the sole and exclusive right of hiring boats for use on a canal, the servient tenement. In the words of Pollock CB at 127-128:

A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property; but he must be content to accept the estate and a right to dispose of it subject to the law as settled by decisions or controlled by act of Parliament.

Martin B added that '[t]o admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates'.²⁵ In the following year, this approach was confirmed in *Stockport Waterworks v Potter*, where Bramwell B concluded bluntly that '[n]ew rights of property cannot be created'.²⁶

To identify the caution in the approach of the common law to creating interests outside the *numerus clausus* should not be taken to imply that there is no scope to accommodate novelty in the creation of property rights. In a large body of case law, courts have repeatedly emphasised the dynamism of the common law in the

²² Ibid 536-7, 1042.

²³ Ibid 536, 1042.

²⁴ (1863) 2 H & C 121, 159 ER 51.

²⁵ Ibid 121, 128.

²⁶ *Stockport Waterworks v Potter* (1864) H & C 300, 321.

area of property law, as evidenced by its frequent readiness to recognise new usages of land by developing the old doctrines to accommodate new conditions. As Lord St Leonards famously declared in *Dyce v Lady James Hay*, 'the category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind'.²⁷ So, legal rules originating in the era of bullock carts and longbows have had no difficulty in evolving to recognise as valid easements the right to store goods²⁸ or the right to use a space to park a car.²⁹ Nonetheless, it is difficult to be convinced by the various judicial pronouncements about property law's expansive evolutionary capacities when the process of embracing new uses is marked by a discernible conservatism. The Australian case law, to be examined below, demonstrates that development in this area has tended to move very slowly, if at all.

As is clear from the dicta referred to above, three separate mischiefs are targeted by this restrictive approach to the creation of novel interests in land. The first of these is the concern to maximise the uses to which land can be used. This policy can be understood fully only by reference to the time and place it emerged. The context was the burgeoning market-oriented economic order in the middle of the 19th Century in England. If this new order was to evolve, it required breaking from the earlier overlapping networks of property rights, and the multiple layers of feudal obligations that impeded the efficient use of land. The fragmentation of property rights into smaller, discrete bundles capable of individual ownership was an essential element for the commodification of land, and, in consequence, for the introduction of economically efficient uses of land. If parties were free to restrict the usages of land by agreements capable of binding successors in title indefinitely, land could be shackled in ways that might revive all the impediments to economic reform that were endemic in feudal real property law.³⁰

A second policy evident in dicta in these cases addresses the vice of adding to the already existing difficulties that confront third parties who purchase the land. Any proliferation of the number and range of rights will tend to make the conveyancing process more complex, time-consuming and hazardous. This policy may be better understood in economic terms. If the categories of property rights over land are too open-ended, enormous transaction costs may arise for persons planning to acquire an interest in the land. It follows that the *numerus clausus* principle can be justified as a balancing act by means of which the largest number of property rights is allowed consistent with the imposition of a reasonably efficient system of conveyancing.

²⁷ (1852) 1 Macq 305, 312.

²⁸ *Attorney General of Southern Nigeria v John Holt (Liverpool) Ltd* [1915] AC 599, 617.

²⁹ *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278. This right appears to be qualified: if it purports to allow the dominant tenement holder exclusive beneficial use of the space, it cannot qualify as an easement. See *Batchelor v Marlow* [2003] 1 WLR 764, [14].

³⁰ See CB Macpherson, *Democratic Theory: Essays in Retrieval* (1973) ch 6; *Property: Mainstream and Critical Positions* (1978) ch 1. The *numerus clausus* principle is an example of the myriad policies by means of which modern liberal capitalist states instrumentally and forcibly remodelled the economic order to set the ground rules for market-based commercial activity. This idea is at odds with many histories that characterise the appearance of markets as driven overwhelmingly from below. See generally Karl Polanyi, *The Great Transformation* (1944).

The third policy is that of protecting the integrity of what Lord Brougham refers to as ‘the science of the law’. This phrase refers to the process of systematisation and rationalisation of the common law that was a dominant concern in 19th Century English legal culture.³¹ If property owners were able to create at whim any kind of property right, the process of measured categorisation of interests by judges, legislators and commentators – the foremost practitioners of ‘legal science’ – would be frustrated. In turn, the capacity for the legal system to develop would founder. No shared professional knowledge about property rights could be firmly established if particular rights could not be described as falling within well-defined categories, and conforming to settled understandings about core principles. The *numerus clausus* assists in this exercise.

Before subjecting these policy considerations to critical analysis, it is important to note how, in one conspicuous and highly influential instance, the metaprinciple of the *numerus clausus* was rejected outright. This was the decision by the Court of Chancery in *Tulk v Moxhay*.³²

III **TULK V MOXHAY: SHUNNING THE NUMERUS CLAUSUS**

Sandwiched, chronologically, between the two landmark decisions of *Keppell v Bailey* and *Hill v Tupper*, the case of *Tulk v Moxhay* displays an entirely different approach to the alleged problem of the proliferation of property rights. The powerful normative force historically exerted by the *numerus clausus* metaprinciple was brazenly resisted in this decision. And, far from producing an undesirable increase in rights, as *Keppell v Bailey* and *Hill v Tupper* insist should be avoided at all costs, this case has been universally welcomed as having expanded the menu of property rights to a highly beneficial degree. From the perspective of the *numerus clausus*, *Tulk v Moxhay* is a striking example both of how contractual rights come to leap the fence to become property rights, and of how they have done so in ways that are eminently consistent with the public interest.

The facts of the case are well known. They involved the enforceability of a contractual promise made by a purchaser not to build on land in Leicester Square in London, the vendor being clearly desirous of restricting development on the land after sale. As noted above, with the exception of an exchange of promises entailing illegality, or being contrary to some other narrowly-defined public policy, contract law will not allow any such promise to be broken if the formal requirements for a valid contract have been met. Parties are therefore perfectly free to make legally binding contracts of this nature. But *Tulk v Moxhay* was not a case in contract. Instead, the court was petitioned by the plaintiff to extend the obligation to abide by the contractual term to a third party, a purchaser from the original covenantor. If the court were to find that the ultimate purchaser was

³¹ A comprehensive account of these developments is offered by David Sugarman, ‘Legal Theory, the Common Law Mind, and the Textbook Tradition’, in William Twining (ed), *Legal Theory and the Common Law* (1986) 26-61.

³² (1848) 2 Ph 774; 41 ER 1143.

subject to this promise, it would be effectively creating a new proprietary interest, a freehold covenant, which would bind the land, over and above the original contracting parties. According to Lord Brougham in *Keppell v Bailey* this was not an option for courts given both the weight of authority against it, and the demands of public policy.

The court disagreed. One of the more remarkable features of the case is the rather superficial nature of the reasoning offered for such a radical departure from the existing law. The contrast with the elaborately-argued judgment of Lord Brougham could hardly be starker. In *Tulk v Moxhay* Lord Cottenham dismissed the authority of *Keppell v Bailey* with the curt conclusion that his predecessor on the Woolsack did not actually mean what he said when referring to the limits on the creation of new property rights.³³ Two brief rationales were offered for this marked deviation from the strict approach taken only a few years before. The first was based on equity's traditional basic norm, that of 'good conscience', or in this context, intersubjective commercial morality. As the Lord Chancellor concluded, 'nothing could be more inequitable' for the original purchaser to acquire land for a lesser sum because it was subject to the covenanted obligation, and then to sell it 'the next day for a greater price' freed from the covenant.³⁴ If the second purchaser knew of the covenant it would be no less inequitable to allow him or her to take free of it. His Lordship added a second, explicit micro-economic policy reason for ruling in favour of the plaintiff: namely, that to allow the land to be freed of the obligation would be to render the original vendor's title 'worthless'. Despite all the warnings from *Keppell v Bailey* about the dangers of creating new property rights, one of which was specifically concerned with the adverse economic impact of such rights, the plaintiff succeeded and a novel proprietary interest was born.

But what exactly was this novel interest? On this point the Lord Chancellor's judgment is not clear. Once the enforceability of contractual promises comes to derive simply from the criteria of (i) the unconscionability of the purchaser who takes with notice; and (ii) the need to protect the value of land retained by the vendor, it is clear that potentially *all promises*, however fanciful, are capable of binding property, and thereby ascending to the status of full property rights. This is because the benefit of a covenant is a right over land in the possession of another. Once enforceable, it becomes 'a valuable asset. It is incorporeal, but is, nonetheless, property'.³⁵ At no point in his judgment did the Lord Chancellor suggest that the rule was confined to covenants that were restrictive in nature. In fact, the reasoning in *Tulk v Moxhay* fails to confine in any way the nature of the

³³ 'He could never have meant to lay down that this Court would not enforce an equity attached to the land of the owner, unless under such circumstances as would maintain an action at law': (1848) 2 Ph 774, 778; 41 ER 1143, 1145. One obvious objection to this argument is that it is viciously circular. The question whether an equity had been effectively attached to the land was the very point the court was being asked to decide. Simpson notes the marked difference between the two approaches. He contrasts Lord Brougham's 'masterly review of the authorities' with Lord Cottenham's not 'particularly convincing' reasoning. See AW Brian Simpson, *A History of the Land Law* (2nd ed, 1986) 257-8.

³⁴ (1848) 2 Ph 774, 778; 41 ER 1143, 1144.

³⁵ *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1, 286 (Deane J).

promise that might form the subject matter of the covenant. The case therefore had the potential to completely undermine the *numerus clausus* and allow any and every type of property right to be created, even in favour of those who did not retain rights over any nearby land. The ‘fullest latitude’ that Lord Brougham acknowledged applied to the creation of contractual obligations, given the breadth of this ruling, could now feasibly apply to every imaginable ‘fancy’, at least if the purchaser had notice of it.³⁶ And this is almost exactly what happened in the years immediately after *Tulk v Moxhay* was decided.³⁷ For instance, *Morland v Cook*³⁸ held that *Tulk v Moxhay* was authority for the proposition that both positive and negative covenants would bind successors in title with notice; while *Luker v Dennis*³⁹ decided that the covenantee did not need to retain benefited land to enforce the covenant. More radically, and controversially, in *De Mattos v Gibson*⁴⁰ the principle was extended to personalty.

In due course, a compromise was reached. Later decisions variously confined the freehold covenant to negative obligations; to situations where the obligations were intended to run with the land; and to those cases where the covenant related to land.⁴¹ More significantly, the reasoning in this decision was promptly ignored in *Hill v Tupper*. In this case, as noted above, the measurement problems faced by third party purchasers where a wide diversity of property forms prevails – so conspicuously absent from consideration by Lord Cottenham in *Tulk v Moxhay* – was again seen to tip the scales against recognition of new interests.

How are we to characterise this acute judicial disagreement, particularly when an examination of other cases decided at the time manifests a more widespread rift in opinion in the Court of Chancery on the question of increasing the number of property interests? Remarkably, in 1838, the Vice-Chancellor, Sir Lancelot Shadwell, decided in *Whatman v Gibson* that contractual promises were indeed enforceable against successors in title of the promisor.⁴² This decision was only 4 years after, and clearly at odds with, the decision in *Keppell v Bailey*. He reached a similar conclusion in 1846 in *Mann v Stephens*.⁴³ Only two years later, he was the primary judge in *Tulk v Moxhay* whose judgment was upheld.⁴⁴ It appears from this body of divergent case law over a very short historical period,

³⁶ *Keppell v Bailey* (1834) 2 M & K 517, 536; 39 ER, 1049.

³⁷ See generally, Simpson, above n 33, 256-60.

³⁸ (1868) LR 6 Eq 252. See also *Cooke v Chilcott* (1876) 3 Ch D 694.

³⁹ (1877) 7 Ch D 227.

⁴⁰ (1858) 4 De G and J 276. See also *Lord Strathcona SS Co v Dominion Coal Co* [1926] AC 108. This line of authority is controversial. In *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 Diplock J expressed the view that *Strathcona* was not good law. For an analysis of the issues raised by these cases, see Simon Gardner, ‘The Proprietary Effect of Contractual Obligations under *Tulk v Moxhay* and *De Mattos v Gibson*’ (1982) 98 *Law Quarterly Review* 279; and Brendan Edgeworth, CJ Rossiter and MA Stone, *Sackville and Neave: Property Law, Cases and Materials* (7th ed, 2004) 973-7.

⁴¹ *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *LCC v Allen* [1914] 3 KB 642; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146.

⁴² (1838) 9 Sim 196, 207; 59 ER 33, 338. For a detailed history of Lord Cottenham’s career, and his role in this particular debate, see Fiona R Burns, ‘Lord Cottenham and the Court of Chancery’ (2003) 24 *Legal History* 187, 201-3.

⁴³ (1846) 15 Sim 377, 388; 60 ER 665, 666.

⁴⁴ For a discussion of this debate, see Simpson, above n 33, 256-60.

therefore, that the *numerus clausus* is not best described simply as a higher-order, rigid norm of property law. As is clear from the case law, and the positions of the various protagonists, it was a highly controversial notion at the time, even, or particularly, in Chancery. It follows that it may be more accurate to describe the *numerus clausus* as operating in the same way as one of Ronald Dworkin's 'principles', namely by exerting 'gravitational force' on the relevant legal doctrine; it influences, but does not necessarily determine, the interpretation of rules in specific cases.⁴⁵

In Dworkin's account, it is typical for a number of principles to feature in the one decision, pulling in different directions. In this contest of principles, any one principle may be confronted and overrun by weightier, oppositional principles. *Tulk v Moxhay* and those later authorities that marked out the boundaries of the freehold covenant are examples of this interpretive process at work. By fashioning the novel proprietary interest on the basis of the different principles of protecting covenantees in the enjoyment of their land, and of proscribing unconscionable behaviour, the judges were able to find policies that justified prising open the formerly closed list, and thereby circumventing the *numerus clausus*.

Broader, compelling policy reasons, or principles, beyond the arguments articulated by Lord Cottenham, are available to explain more fully why the recognition of the freehold covenant was broadly welcomed, even though to do so was palpably at odds with the earlier authority establishing the *numerus clausus*. They revolve around the social and environmental need for property law to provide mechanisms to protect the character, amenity and condition of property, and to safeguard the integrity of wider neighbourhoods. In the particular context of Victorian England these policies extended to guarding against the frequently catastrophic effects of unrestrained economic growth, urbanisation and industrialisation. By creating these novel proprietary tools, property law offered a valuable regulatory mechanism to restrain environmental degradation, to salvage heritage buildings from demolition or re-development, and to preserve the identity and character of urban neighbourhoods by means of private agreement. The importance of such a new property right had been articulated by the Real Property Commissioners not long before *Tulk v Moxhay* in their 1832 Report, where they specifically recommended legislation to allow freehold covenants to run with land.⁴⁶ *Tulk v Moxhay* can therefore be seen as judicial endorsement of that legislative proposal at a time when statutory regulation of urban planning was virtually non-existent.⁴⁷

⁴⁵ See generally, Ronald Dworkin, *Taking Rights Seriously* (1977).

⁴⁶ Real Property Commissioners' Third Report, Parliamentary Papers 1832 (484) XXIII, 321. For a general discussion of the interplay between the case law and the Report, see Susan I George, 'Tulk v Moxhay Restored – To Its Historical Context' (1990) 12 *Liverpool Law Rev* 173.

⁴⁷ As Bradbrook and Neave note, the first significant town planning legislation in England did not appear until 1909: Adrian J Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia* (2nd ed, 2000) 268.

The later confinement of the freehold covenant (to negative covenants, the imposition of the requirement that there must be relevant benefited property, and the restriction of this covenant to land rather than all forms of property), were influenced by a different, and countervailing economic policy. It concerned the need to restrict the market power of some covenantees, particularly those with substantial portfolios of real estate, for the reason that in the absence of these limitations on the rule, 'equitable theory served the purposes of monopolising entrepreneurs'.⁴⁸ From the distant, historical vantage point from which we can now consider this episode of judicial conflict, what is particularly perplexing is that the freehold restrictive covenant is the only novel interest to be admitted by the courts to the closed list in more than a century and a half. The story of the two divergent approaches in *Keppell v Bailey* on the one hand, and *Tulk v Moxhay* on the other, might reasonably have been supposed to lead to more interests being admitted over time by means of arguments based on 'conscience', the importance of maintaining the value of the land to the original (and succeeding) covenantees, and the wider public interest. On the contrary, the general response of courts has been to abandon the equitable principles and policies that were decisive in *Tulk v Moxhay*, preferring to revert to *Keppell v Bailey* and its lineage, thereby 'bolt[ing] the door on existing categories'.⁴⁹

Given the absence of any effective regime of planning law at the time, judicial recognition of the freehold restrictive covenant met an acute social need. More generally, the case demonstrates that Lord Brougham's lugubrious assessment about the consequences of creating and recognising new interests in land was seriously overstated. In adding this interest to the list, the court offered a necessary supplement to ensure 'optimal standardisation' of the general menu of proprietary interests. But what exactly does 'optimal standardisation' mean in this context, and how does it fit with the *numerus clausus* metaprinciple, and the relevant policy considerations? This question will now be examined.

⁴⁸ Uriel Reichman, 'Judicial Supervision of Servitudes' (1978) 7 *Journal of Legal Studies* 136, 147.

⁴⁹ Susan Bright, 'Of Estates and Interests', in Susan Bright and John Dewar, eds, *Land Law: Themes and Perspectives* (1998) 529, 546; Gray and Gray, above n 17, 635. Of course, it should be emphasised in the Australian context that the belated recognition of native title in *Mabo v Queensland* (1992) 175 CLR 1 and subsequent case law arguably represents a dramatic amplification of novel property rights by the courts. This paper is not concerned with this development, but with the closed list of non-traditional property rights. For an analysis of native title as a property right, see Richard H Bartlett, 'The Proprietary Nature of Native Title' (1993) 6 *Australian Property Law Journal* 1.

IV OPTIMAL STANDARDISATION AND THE *NUMERUS CLAUSUS*

According to Thomas Merrill and Henry Smith, the function of the *numerus clausus* is as follows:

By permitting a significant number of different forms of property but forbidding courts to recognize new ones, the *numerus clausus* strikes a balance between the proliferation of property forms, on one hand, and excessive rigidity on the other. Proliferation is a problem because third parties must ascertain the legal dimensions of property rights in order to avoid violating the rights of others and to assess whether to acquire the rights of others. Permitting free customization of new forms of property would impose significant external costs on third parties in the form of higher measurement costs.⁵⁰

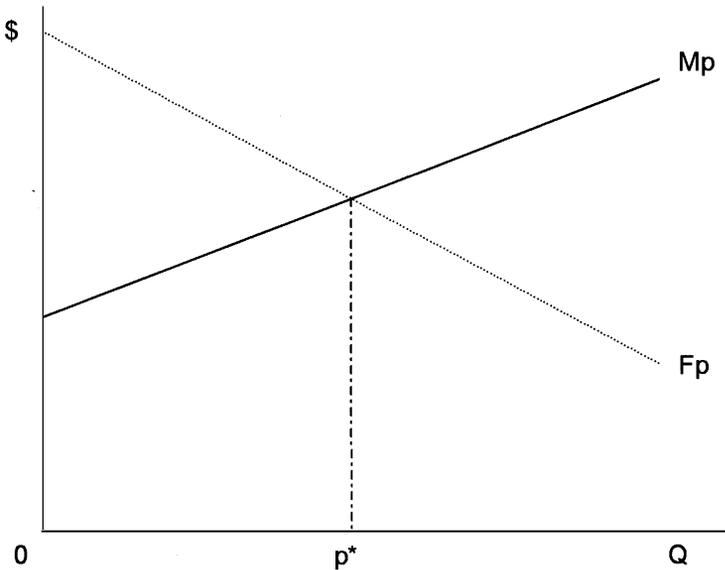
The key problem described by Merrill and Smith as 'external costs', or externalities, is an abiding focus for theorists of law and economics. In this instance, it concerns the measurement costs incurred by parties who are external to dealings between particular contracting parties. In an ideal market, the costs of transactions are internalised to those who deal with each other. Where commercial actors generated external costs, the market is working inefficiently.

Merrill and Smith demonstrate this idea at work in the context of the *numerus clausus* problem by taking the example of rights over a watch. Let us assume, they argue, that it is possible in law to fragment property rights over a watch so that a particular seller A and a particular purchaser B agree to transfer and acquire respectively rights to use the watch on Mondays only. B would have a 'Monday' watch, leaving A the right to retain or transfer the remaining days. Were such a regime of property fragmentation legally possible, the range of property rights would increase exponentially, and this arrangement may certainly be consistent with the desire and personal interests of A and B. This right might be worth, say, \$10 to them. But there is downside: later prospective purchasers of the respective interests of both A and B would need to check when purchasing every watch in order to make sure that no days had been previously sold off. Assuming that there are 100 purchasers of watches in the relevant market, and that the cost of searching for this newly fragmented proprietary interest is \$1 each, the overall external, or social, cost of protecting such a right is \$100. It follows that affording legal protection of this right generates a net social cost of \$90. Any benefit to the parties is therefore greatly outweighed by the wider cost. This simple example demonstrates the inefficiency of having this kind of a fragmentation of rights in the property law of any legal system.

⁵⁰ Merrill and Smith, above n 4, 69. Also see Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357, 385-8.

Merrill and Smith represent diagrammatically in Figure 1 how the proliferation of property forms produces social costs, and how they need to be set off against the benefits of an increasing range of proprietary options (to A and B in the above example).

Figure 1. Optimal range of proprietary interests⁵¹



*Mp is the marginal cost⁵² of discovering property rights
Fp is the marginal benefit⁵³ of allowing greater diversity of property forms*

The variable p on the x -axis represents the range of possible forms of property. The y -axis measures marginal changes in social wealth. In general, the greater fragmentation of property interests that is possible, the greater is the cost of property transactions. This is represented by the Mp line. By contrast, the lower the number of the property interests, the cost of discovering the relevant interests over land will be less. The Fp line marks out the marginal benefit associated with recognition of various property interests. As the forms of property increase, from the most basic such as the fee simple to the more particularised and fanciful forms, the level of frustration, and therefore ‘cost’, to parties wishing to create them, but prevented by the *numerus clausus* from doing so, will diminish. A legal system with only two or three available property interests would impose substantial frustration costs on citizens; but if ‘fancies’ are not given proprietary status, very little social cost would result because comparatively few individuals

⁵¹ Merrill and Smith, above n 4, 39.

⁵² ‘Marginal cost’ is the cost of discovering the next novel property interest. It differs from ‘average cost’ because it increases with each new interest.

⁵³ ‘Marginal benefit’ is the benefit that results from the recognition of a novel property interest. It differs from average benefit for the same reason that apply to marginal costs.

would want them. Accordingly, the point p^* represents the optimal number of standardised property interests.

In consequence, Merrill and Smith argue, the *numerus clausus* functions as a very useful tool to ensure 'optimal standardisation' of proprietary interests. Those that are most needed, statistically, economically, and socially, are those that have received the blessing of property law. Accordingly, the presently available package, from the estates to the servitudes and security interests, reflects widespread social and economic need. Other potential candidates, such as licences, positive freehold covenants, easements in gross and so forth, are cast to the outer darkness of contract law, because any benefit in their recognition is outweighed by the social cost they generate. The frustration costs caused by their non-recognition are considered to be small when compared with the potentially large transaction costs generated, so property owners as a whole are better off without them. In this context, the freehold restrictive covenant can be seen as a borderline case. As the interest that was historically admitted last, it had the effect of shifting the point p^* away from the y-axis on the graph to the point of optimality.

While this graphic representation captures the interplay between the cost and benefits of proliferation of property forms, and the transaction costs imposed on purchasers, it is open to a major objection. This is the 'liberal' critique. It insists that the state should impose the minimum possible restriction on the rights of property holders. Law should therefore have an inbuilt presumption in favour of the right of private individuals to create by contract whatever range of property rights they wish. If new property rights turn out not to be socially beneficial, the reduced price payable for them will be sufficient measure of compensation for the social cost. Moreover, property holders will appreciate this possible outcome, and will thereby be induced to create only beneficial new property rights. To return to Merrill and Smith's watch example, the seller might well not create a Monday right, if she considered the likely difficulties of selling a watch which brought with it usage rights for only 6 days. This line of reasoning expresses the core idea of traditional liberal theory that individuals, not courts or legislatures, are the best judges of social utility.

This argument is put most forcefully by Richard Epstein.⁵⁴ He suggests that rules that seek to limit property holders' freedom, such as those governing easements or perpetuities, should be swept away, leaving individual property owners an unrestricted capacity to create their own property interests. Socially costly interests will not be a general problem, because market forces will ultimately put pressure on owners to limit their creativity to useful interests. He addresses the problem of externalities by means of an apparently simple solution: the enforceability of all proprietary interests should depend on notice, and that notice should be achieved exclusively by means of recordation in a public register.

⁵⁴ Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *Southern California Law Review* 1353; Richard A Epstein, 'Past and Future: The Temporal Dimension in the Law of Property', (1986) 64 *Washington University Law Quarterly* 1353.

Once registered, it should not matter what form the interest in question takes. It follows that the *numerus clausus* has no useful role to play in contemporary property law. Hence, there is no optimal point of standardisation; the more interests the better, if that is what property owners want. From this perspective, cases such as *Keppell v Bailey*, *Hill v Tupper* and *Stockport Waterworks v Potter* are based on flawed logic. They are both misguided and illiberal; and misguided because illiberal.

Merrill and Smith object to this reasoning by tackling Epstein's notice solution. They argue that, even with the requirement of notice by registration, his analysis omits to factor in the true social cost of the multiplication of property rights. This is because he fails to acknowledge fully that the process of searching for interests in the context of a registration system is still one that generates significant measurement costs:

Making the running of a fancy depend solely on the original parties' intent and on notice – even recorded notice – to subsequent parties acquiring property assumes that notice is the most cost-effective method to minimise third-party information costs. But notice of idiosyncratic property rights is costly to process, and, although land registers furnish notice at far lower cost than would a doctrine of constructive notice, even they can require lengthy and error-prone searches.⁵⁵

From this position, it follows that optimal standardisation is still an important policy objective, but it changes with the introduction of registers by allowing for a greater number of property rights – a longer list – than is the case where no registers exist for the reason that they function primarily to reduce transactions costs by making proof of title cheaper and quicker. This is a telling point, and Merrill and Smith do seem to offer a convincing compromise between a highly restrictive *numerus clausus* and a completely liberal regime.

However, this riposte suffers from its own weaknesses. In particular, the argument appears to be insufficiently developed for the purposes of offering recommendations as to whether a more restrictive or more liberal regime should be in place. Merrill and Smith concede that systems of registered title provide the basis for a longer list of property rights, that is, that the optimal number increases,⁵⁶ but their argument fails to examine how those registers differ. It follows that they are prevented from offering the means to assess whether the list in any particular regime is optimal or not. They appear to assume that all registration systems are similarly beset by the problem of 'lengthy and error-prone searches'.⁵⁷ But registers of property interests differ dramatically in their capacities to reveal fully, speedily and cheaply all interests affecting land. On the one hand, there are common law, or old system, deeds registers. These registers

⁵⁵ Merrill and Smith, above n 4, 45.

⁵⁶ *Ibid* 41.

⁵⁷ The authors acknowledge in a footnote that 'processing costs can be higher or lower depending on how notice is presented' (at 44) but do not take this important point any further to explore different kinds of registers.

make little headway in resolving the inefficiencies of general law deeds-based conveyancing because they incorporate many of the problems of the earlier model. In particular, because they retain to a substantial degree the doctrine of notice for unregistered and unregistrable interests, they resolve one problem (priorities) while leaving the other (the discovery process) significantly unaffected.⁵⁸ On the other hand, there are Torrens-type registration systems. By contrast, all the available empirical evidence about these registration systems points to a very low level of 'lengthy and error-prone searches'. They effectively remove the doctrines of constructive and actual notice, and thereby require interest-holders to register or otherwise notify the vast majority of their interests on the register. By comparison with the former regimes, as systems for creating rather than recording title,⁵⁹ they are remarkably cheap and effective systems for discovering the existence of property interests.

It follows that the question as to whether a particular number of proprietary interests is optimal is inextricably related not just to *whether* a registry is in place, but to the relative efficiency of the land title regime in place at any particular time. Where property law systems have established Torrens registers, the consequent reduction in transaction costs lends support to the argument that they should adopt a much more flexible approach to the creation of new interests. But where proof of title is dependent largely on documents executed by parties, and present ownership is established by producing an unbroken chain of title documents, the attendant high transaction costs imply a smaller menu.⁶⁰

I attempt to demonstrate graphically in Figure 2 the advantages of registration systems over common law deeds-based title regimes. The optimal standardisation under each regime is demonstrated at the point *p* where the M line cuts the F line, that is, where the costs of introducing a further proprietary interest outweigh the benefits that the new interest brings.

FIGURE 2, pp405-6

The following corrections should be made:

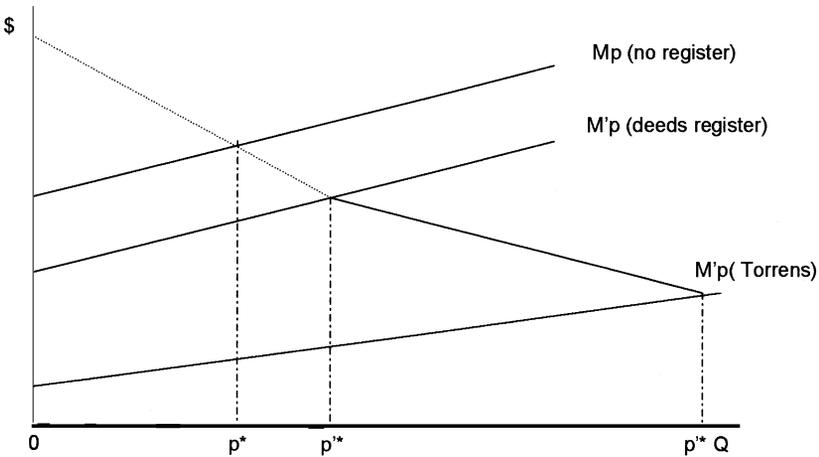
- (1) the M graph lines are Mp, Mp' & Mp" (not Mp, M'p & M'p)
- (2) on the x axis, the letters are p*, p'* & p"* (not p*, p'* & p'*)
- (3) add notation $F=Fp'=Fp''$ in the diagram just below the 3rd intersection of the M & F lines (below the notation Mp'(Torrens))
- (4) in the final line of the italicised explanations below figure 2, and in line 5 in text on p405, it is $F=Fp'=Fp''$ (not $F=Fp'=Fp'$)
- (5) line 9 of text on p405, and line 7 on p406, Mp' (not M'p).

⁵⁸ The relevant Australian legislation is: *Conveyancing Act 1919* (NSW) Pt XXIII; *Property Law Act 1974* (Qld) ss 241-9; *Registration of Deeds Act 1935* (SA); *Registration of Deeds Act 1935* (SA); *Property Law Act 1958* (Vic) Pt I; *Registration of Deeds Act 1856* (WA).

⁵⁹ See *Breshkar v Wall* (1971) 126 CLR 376, 381 (Barwick CJ).

⁶⁰ Alain Pottage, 'The Originality of Registration' (1995) 15 *Oxford Journal of Legal Studies* 371, 386 concludes that under registration systems title is 'no longer grounded in a practice of 'social mnemonics' – the rich medium of practical social memory – but in administrative practice'.

Figure 2. Optimal number of proprietary interests before and after registration systems⁶¹



M_p is the marginal cost of discovering property rights where there is no register

M'p is the marginal cost of discovering property rights where there is a deeds register

M''p is the marginal cost of discovering property rights where there is a Torrens register

F_p = F_{p'} = F_{p''} is the marginal benefit of increasing parties' freedom to create new property forms

Figure 2 seeks to show that as registration systems become more accurate mirrors of the range of proprietary interests over land, significant increases in the range of property interests can be accommodated, and with relative ease because the register significantly reduces transaction costs in relation to their discovery and measurement. The different gradient of the $F_p = F_{p'} = F_{p''}$ line from the y-axis to point p^* represents the exponential increase in efficiency represented by Torrens-type registers over deeds registers, where the register functions both as a 'mirror' of all interests over the land, and a 'curtain' to render irrelevant to any title search of antecedent dealings over the land.⁶² The $M'p$ line both starts at a lower cost point, as well as ensuring that costs increase less steeply than is the case with deeds registers. In other words, not only can the simplest interest, the fee simple, be created more cheaply under a Torrens system than under the common law or deeds-based registration systems, but also the cost increase for discovery of other, more elaborate interests is proportionately less than under other regimes because time-consuming historical searches of title are

⁶¹ This diagram is rather more elaborate than that of Merrill and Smith (at 41) because it offers a comparison between different registration systems.

⁶² Theodore BF Ruoff, *An Englishman Looks at the Torrens System* (1957).

unnecessary. This means that Torrens systems can more readily accommodate a much wider range of interests in land, imposing minimal additional transaction costs on successors in title. In turn, the optimal number of proprietary interests available under such a new regime increases geometrically, as is reflected in Figure 2. The net effect of the Torrens system is to push the optimal point much further away from the y-axis. It is also registered in a change in the gradient in the M'p line after point p'*

The configuration of Figure 2 suggests that the liberal position espoused by Epstein should be rejected, but for reasons that differ from those of Merrill and Smith. In contrast to Epstein, my argument is that there will always be a need for an optimal number of interests for which property law is the legitimate gatekeeper. Lord Brougham's warnings about the indefinite proliferation of interests retain some force, though this force is diminishing over time. At the very least, novel interests should be close in form to those presently on the list. Any change in the *numerus clausus* should be incremental. In gaining admission to the list, it would also make sense to impose a requirement of some kind of public benefit test before being recognised. Examples of contractual rights that would have difficulty passing this test would include covenants that do not 'touch and concern' the land, such as covenants to provide personal services that contracting parties might wish to annex to land. A further objection to Epstein's liberal critique, which is relevant to liberal philosophy in general, concerns the necessary limits of freedom. When Epstein describes the freedom to create new property interests, he does so from the perspective of the present owner of property. But if one looks at non-owners, who may at some future time come to acquire property, their freedom to do what they will with their property may be heavily circumscribed by the shackling of land with 'fanciful' obligations. For this additional reason, public policy requires some limits to be placed on the capacities of parties to fragment rights and interests in land excessively. In this case also, Lord Brougham's reference to novel interests causing 'inconvenience to the public weal' remains relevant, but not decisive.⁶³

Though there may have been very good reasons why the common law should have taken a strict approach to new interests 160 years ago because of the absence of an effective registration system for interests in land, the pervasiveness of registers today renders these rules somewhat obsolete and economically retrograde. A wider diversity of interests would certainly make title searches different, but this does not necessarily translate to greater expense, or increased 'measurement costs'. It is also the case that the economic benefits of having some new interests may well far outweigh what would at most be very small increases in cost. This is particularly so where registers are computerised because the technology is likely to have the effect of lowering information costs.⁶⁴

This point is underscored by the fact that some 19th Century property law reformers saw the simplification of property interests *as an alternative to*

⁶³ Merryman, above n 1, 224-31.

⁶⁴ Merrill and Smith, above n 4, 42. This point is not developed by the authors so as to provide

registers in the cause of reducing conveyancing costs.⁶⁵ *Keppell v Bailey* and *Hill v Tupper* represent judicial expressions of this policy preference. Given the absence of registers at the time of the crystallisation of the *numerus clausus* metaprinciple, it is not unreasonable to speculate that the rule as formulated in those cases may never have been introduced, or at least it may not have appeared in its present form, if an effective system of registration were already in place. The minimisation of property forms was the second-best way to resolve the third-party problem. Now that we have the best alternative in place, and in a form (that is, the Torrens system) more efficient than any proposed, or introduced, in 19th Century England, the major reason for retaining the *numerus clausus* in its present, restrictive form is significantly weakened.⁶⁶ Furthermore, as *Tulk v Moxhay* clearly demonstrates, far from rendering land worthless, novel interests may actually enhance the value of land, rather than encumbering it in an unreasonable manner. As society, the environment, and cultural norms change, emergent usages, once considered fanciful, may become increasingly desirable and valuable, and therefore legitimate candidates for membership of this exclusive club.⁶⁷

The final argument advanced by Lord Brougham in favour of the *numerus clausus* – the need to protect the integrity of the science of the law – is also no longer a strong one, if it ever was. As the regimes of Crown lands and strata schemes demonstrate, highly intricate, multi-layered, and most importantly, novel regimes have made property law significantly more complex over recent decades. But they have not done so in a way as to render it chaotic, or incapable of ‘scientific’ classification. As long as novel rights can be particularised with reasonable precision they do not necessarily lead to difficulties in classification. A final point can be drawn from the existence and proliferation of these more recent, and welcome, systems of fragmenting property rights: they operate with a high level of effectiveness because they appear as registered interests within the Torrens system. These regimes, and this system, allow property owners the opportunity of liberal customisation of rights well beyond the boundaries traditionally imposed by property law’s *numerus clausus*. This new landscape of property rights does not impose undue transaction costs on third parties in practice because these obligations are readily discovered from the register.

(footnote 64 cont’d) any critical insights into the adequacy of the present menu. As they emphasise, this is not the aim of their article.

65 See CE Thornhill, ‘How to Simplify Our Titles’ (1889) 5 *Law Quarterly Review* 11.

66 This is not to suggest that the Torrens registers are completely accurate mirrors of all interests over land due the various statutory exceptions, and the courts’ recognition of unregistered interests in land. For statutory exceptions, see eg *Real Property Act* 1900 (NSW) s 42; and for the recognition of unregistered interests and the *in personam* exception, see *Barry v Heider* (1914) 19 CLR 197 and *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 respectively. For a thorough analysis, see Peter Butt, *Land Law* (5th ed, 2006) 774-98.

67 See, eg, Carol M Rose, ‘The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems’ (1998-99) 83 *Minnesota Law Review* 129; Adrian J Bradbrook, ‘The Development of an Easement of Solar Access’ (1982) 5 *University of New South Wales Law Journal* 229. Importantly, in order to resolve the third party problem, the Torrens system would need to be reformed to accommodate any novel property rights. For an example of a new type of right introduced by statute, and required to be registered in order to take effect, see *Conveyancing Act 1919* (NSW) ss 87A, 88AA, 88AB, and 88EA(2) (forestry rights and carbon sequestration rights as profits à prendre). See also, n 104 below and accompanying text.

V THE *NUMERUS CLAUSUS* AT WORK IN RECENT AUSTRALIAN PROPERTY LAW

In the past couple of decades, a number of cases have appeared in Australian courts which have presented opportunities to broaden the list of property rights in the separate areas of licences, freehold covenants, easements and profits à prendre. It will be seen that the creative break represented by *Tulk v Moxhay* remains an isolated instance of proprietary creativity in the landscape of property rights. In general, the courts have displayed a restrictive approach to expanding the number of interests in land, or even extending the boundaries of existing interests in land when presented with the opportunity to do so. These interests will be examined separately.⁶⁸

A Licences

The issue of the *numerus clausus* was raised most recently in the context of licenses in *Georgeski v Owners Corporation SP49833 and Others*.⁶⁹ At issue was the extent of the rights of a licensee of land. The plaintiff was the registered proprietor holding under a Crown lease of land abutting the Georges River in New South Wales. The northern boundary of the property was the mean high water mark of the river. The defendants were, respectively, the owners' corporation under a strata scheme affecting an adjoining property, various registered proprietors of lots in the strata scheme, and the Crown in right of New South Wales. The owners' corporation and each lot owner in the strata scheme were registered proprietors of a right of footway over a narrow strip of the plaintiff's land from their property to the bank of the Georges River.

The plaintiff also held a licence from the Crown. The area of Crown land that was the subject of the licence was a rectangular extension of the strip of the plaintiff's land that was the lower section of the site of the right of footway. The plaintiff sought declaratory and injunctive relief to prevent the holders of the right of footway from trespassing on a slipway and jetty that the plaintiff had constructed on the land subject to the licence. They sought orders to the effect that the defendants were not entitled to use the jetty and slipway for any purpose (including fishing, boating, skiing, swimming and other such activities) other than to traverse them in order to access the foreshore.

The plaintiff's claim raised three basic questions. The first was the nature and extent of the plaintiff's rights in relation to the Crown land the subject of the licence. Second, whether, and if so how, were the rights over the jetty and the slipway to be classified under the law of property? Third, did the rights of the

⁶⁸ It is notable how, in the case of licences, English courts have been much more open to debating whether they should be admitted to the list of property rights. For an extended discussion, see Nigel P Gravells, *Land Law: Text and Materials* (3rd ed, 2004) 538-77. No such debate is generally evident in Australian case law. See generally, Edgeworth, Rossiter and Stone, above n 40, 9-20.

plaintiff over the jetty and slipway support a right to resist interference by bringing an action in trespass?

The answer to each of these questions was complicated by recent authority from the English Court of Appeal. In the majority decision of *Manchester Airport Plc v Dutton*,⁷⁰ the Court held, by majority, that where a licensee has been granted a right of occupation of land, he or she will have a sufficient right to support an action in trespass against any person who directly interferes with it. It followed that the plaintiff company, which had been granted a contractual licence to prepare a site for the construction of a new airport runway, could sue trespassers who had entered protesting against the operation, even though they had not yet entered onto the site. This decision is an important one in property law because it raises the status of the licence from purely a contractual right, to one at least akin to a proprietary right. It ceases any longer to be enforceable solely against the grantor, and therefore purely personal, but can be asserted against third parties in ways that mirror a defining characteristic of traditional property. The case has since been cited in later cases at the appellate level without any criticisms being directed at the majority's reasoning.⁷¹

Unsurprisingly, the plaintiff relied heavily on this case, claiming that the licence entitled him to enforce it against the defendants by suing in trespass. Barrett J rejected this argument, relying on traditional authority to strike out the plaintiff's claim. He referred to *Radaich v Smith*⁷² and *Western Australia v Ward*⁷³ to support the traditional notion that an action in trespass to land may only be brought by a person in possession of the land. A licensee does not have possession; at most, he or she has a right of exclusive occupation of the land. He cited with approval Windeyer J's dictum in *Radaich v Smith*: 'A right of exclusive possession is secured by the right of a lessee to maintain ejection and, after his entry, trespass.'⁷⁴

In relation to the three questions raised by the plaintiff, Barrett J's answers were as follows: (i) on close scrutiny, the instrument executed by the parties gave the plaintiff a licence, not a lease; (ii) this right lies outside the closed list of property rights, as established by a long line of authority; and (iii) licensees do not have exclusive possession, and so cannot sue in trespass. He reiterated the traditional rule, concluding (at [102]) that '[r]emedies for trespass vindicate possession, not occupation'. During the life of the licence, it is the licensor who retains the right

⁶⁹ (2005) 12 BPR 22, 573.

⁷⁰ [2000] QB 133.

⁷¹ *Countryside Residential (North Thames) Ltd v Tugwell* (2001) 81 P & CR 2; *Alamo Housing Co-operative Ltd v Meredith* [2003] EWCA 495. It is noteworthy that ever since *Errington v Errington* [1952] 1 KB 290, English appellate courts have been deeply divided over the status of the contractual licence, for reasons that stem directly from the acute and vulnerability of the licensee. *Ashburn Anstalt v Arnold* [1989] Ch 1 appeared to have restored the traditional rule that contractual licences do not confer proprietary rights, and are therefore not enforceable against third parties. But it did not do so definitively, and *Manchester Airport Plc v Dutton* clouds the issue further.

⁷² (1959) 101 CLR 209.

⁷³ (2002) 213 CLR 1, 223 (McHugh J).

⁷⁴ (1959) 101 CLR 209, 223.

to sue; if they decline to do so, the licensee has no remedy against the trespasser for invasion of land. Importantly, in concurring with Martin B's approach in *Hill v Tupper*, that to allow the licensee this right in this instance would lead to 'an indefinite increase of possible estates', Barrett J offered a strong reaffirmation of the *numerus clausus* metaprinciple. He reiterated the traditional rationale for keeping a tight restriction on the list of available property rights, especially in the case of licences, so that only where the licence was coupled with the grant of an interest, such as an easement or profit, would a right to sue for interference lie against third parties.

As we have seen above, this particular rationale derived most of its force in the context of a complete absence of systems of land registration. This approach appears to be unduly restrictive in light of all-pervasive Torrens registers. There is far less need at the present time to protect purchasers by means of keeping tight limits on the numbers of property rights. It might be argued that there are even stronger reasons for recognising the proprietary status of licences such as the one in this case because the contractual licence conferred a right of exclusive possession, and therefore provides a bundle of rights similar to that of the lease, an existing proprietary interest. Certainly, little inconvenience or cost would be caused to third parties if contractual licences were admitted to the property fold, at least if it were not an exception to indefeasibility, and thus needed registration for enforceability against third parties. The acute and unjustified vulnerability of the licensee, if not accorded proprietary status, has already been recognised in legislation across Australia in the context of residential tenancies, where occupants who are either lessees or licensees with 'exclusive occupation' are afforded the same measure of protection. In this instance, the plaintiff was placed in an invidious position where he was reliant on the licensor, who was not inconvenienced by the activities in question, to commence action against the defendants. In practice, it will be very difficult to persuade licensors to assist aggrieved licensees in this way.

By adopting this traditional approach, this decision will avoid the controversy provoked by *Manchester Airport v Dutton*. Critical responses from commentators have included the point that the case represents an exercise in 'opening the numerus clausus'.⁷⁵ So, William Swadling argues that the majority was in error in concluding that the licensee in this case were not given possession of the land by the contract with the licensor; it merely received a right to remain in occupation which was enforceable against licensor, and only against the licensor, because it remained a personal right. Had the contract granted the company possession, it would have received a full proprietary right, namely a leasehold estate, which would have brought with it the right of enforceability against third parties. He concludes that since the protesters were not party to the contract entered into by the plaintiff company and the National Trust, and since the plaintiff did not have any factual possession of the land, then, unless a

⁷⁵ Swadling, above n 1.

⁷⁶ *Ibid* 358.

⁷⁷ See text accompanying footnotes 33-49.

contractual licence to occupy land has suddenly leapt the personal/property divide, it could not have bound the protesters.⁷⁶

It follows from *Manchester Airports v Dutton* that insofar as a licence to occupy premises can confer some rights against third parties, it has one of the definitive characteristics of a proprietary right, and so appears to have indeed ‘suddenly leapt the personal/property divide’. By contrast, in Australia the orthodox position prevails.

B Positive Covenants

I have noted above that, after a brief flurry of creativity, *Tulk v Moxhay* was held to be authority for the proposition that only covenants that were negative in nature could bind successors in title, and then only if they took with notice of the covenant.⁷⁷ There is little to suggest that the failure of the law to embrace positive covenants is founded on sound public policy. After all, why should a 999 year lease allow the burden of positive covenants that touch and concern the land to run with the lease, when the freehold will not? And why is it possible to pay a lump sum as consideration for the grant of an easement, or for an easement to be granted gratuitously, but not in consideration of a periodic payment for the duration of the easement? Property law provides no satisfactory answers to these questions. One persuasive reason for refusing to allow positive covenants is that they might assist in tying a purchaser and successors in title to an unreasonable vendor. Clearly, in situations where landowners engage in monopolistic behaviour, such covenants might be important tools for the purpose of imposing unreasonable restraints on trade. But property law does not confine the prohibition to such situations; all positive covenants, however beneficial they may be for the property, for neighbours, and or for the locality are equally unenforceable beyond the contractual relationship between the original parties.

A recent case that demonstrates the strictness of this rule is *Clifford v Dove*.⁷⁸ In this case, the plaintiff held an easement over the defendant’s property. It included the right to use cattle yards on the defendant’s servient land, and equipment that was a fixture on that land. After years of protracted disputation, the defendant dismantled the cattle yards and removed the fixtures. The plaintiff sought a mandatory injunction requiring reconstruction of the yards and replacement of the fixtures. The defendant argued that the plaintiff should have exercised his rights under the terms of the s 88B *Conveyancing Act 1919* (NSW) instrument that created the easement. This instrument, which imposed an obligation on both parties to repair and maintain the right of way and cattle yards, also gave either party the right to rectify the other’s default by carrying out repairs at the cost of the defaulting party. The question for the court was whether this procedure was available to the plaintiff, as the defendant was not a party to the original

⁷⁸ (2004) 11 BPR 21,149.

⁷⁹ Gray and Gray, above n 17, 1362. In New South Wales, statute has intervened to allow the running of the burden of positive obligations to repair land that is the site of an easement if they are registered: *Conveyancing Act 1919* (NSW) s 88BA.

instrument. Was this in the nature of a positive covenant, the burden of which in general do not run in Anglo-Australian land law?

Bryson J acknowledged that 'it is not difficult to see inconveniences in this state of the law'. In doing so, he followed a long line of judicial opinion and academic commentary that has expressed frustration and bemusement at this situation, one of the 'scarcely credible features of the modern law of freehold covenants'.⁷⁹ Nonetheless, he refused to follow *Frater v Finlay*⁸⁰ and *Rufa Pty Ltd v Cross*⁸¹ which took a more flexible, and defensible, approach to the question of the enforceability of positive covenants. *Frater v Finlay* established an exception to the general rule that the burden of positive covenants cannot run with freehold land, either at law or in equity. Taking a broad approach, Newton DCJ held that where, as in this case, the covenant in question 'is an easement or part of an easement, or is an incident to an easement' the obligation will be enforceable against successors in title.⁸² The later Queensland case of *Rufa Pty Ltd v Cross*⁸³ adopted a similar rule, allowing the burden of a positive covenant to run so as to bind successors in title of the original parties to an agreement to make proportionate contributions to any extension of a party wall between their properties. On appeal the Full Court of the Supreme Court of Queensland endorsed this result, ruling in favour of the holder of the benefit of the covenant. The reasons of the members of Full Court differ, the majority (Lucas SPJ and DM Campbell J) deciding that such a right was capable of forming the subject matter of a grant, while Kneipp J held that the successor in title to the covenantee was bound on the basis of the 'benefit and burden' principle. *Frater v Finlay* was not referred to. In *Gallagher v Rainbow* McHugh J endorsed this line of authority.⁸⁴

These decisions are sensible responses to the narrowness of Anglo-Australian property law's refusal to recognise positive covenants, without doing violence to established authority. And as a matter of general principle, there appears to be no good reason why the consideration for the grant of an easement should not be in the form of continuing, conditional payment, when it is possible to pay by lump sum, or to make the grant gratuitously. Moreover, in these cases, the conditions were to the mutual benefit of the parties, were well known to them when they acquired their respective interests, were intended to run, and were either for the mutual benefit of the properties concerned, or for the dominant tenement.⁸⁵

In *Clifford v Dove*, by contrast, Bryson J preferred the traditional approach, rejecting this line of authority. He relied on the decision of the House of Lords in *Rhone v Stephens* where it was held that the doctrine of benefit and burden did not extend to a case where a successor in title to a covenantor promised to keep

⁸⁰ (1968) 91 WN (NSW) 730.

⁸¹ [1981] Qd R 365.

⁸² (1968) 91 WN (NSW) 730, 734 (Newton DCJ).

⁸³ [1981] Qd R 365.

⁸⁴ (1994) 179 CLR 624, 647-8.

⁸⁵ Reforms to the *Conveyancing Act 1919* (NSW) introduced in 1996 allow this type of covenant to be enforced against successors in title to the covenantor on registration: ss 87A and 88BA.

a roof in repair. Accordingly the positive obligation was only enforceable in contract.⁸⁶ Lord Templeman held that although that doctrine was one acceptable mechanism to avoid the prohibition, as demonstrated in *Halsall v Brizell*,⁸⁷ it should be construed restrictively. It was held not applicable in this case because the benefit (of support and eavesdrop) was an independent right and not related to the burden (duty to maintain the roof). This doctrine is clearly not applicable in *Clifford v Dove* because, as Bryson J noted, the defendant elected not to take the relevant benefit, namely that of utilising the cattle yards.⁸⁸ But it was open to the court to find that this positive obligation was enforceable on the separate ground that it was ‘incident to’ the grant of the easement, as was held in *Frater v Finlay*. The particular obligation in respect of the cattle yards was expressed in the grant of the easement as part of the shared duties of both parties in respect of its maintenance.⁸⁹ Instead, Bryson J, however, chose to read down *Frater v Finlay* by considering it as an example of the benefit and burden principle. He also, without giving reasons, narrowly construed McHugh J’s reference to this case and *Rufa Pty Ltd v Cross* as having ‘assumed but to my reading should not be understood to have decided that the benefit and burden principle extends to persons who are not parties to or named in the deed’.⁹⁰ The general tenor of the reasoning in this case, and the result, typifies the overly strict approach taken recently by the courts in these cases.

C Easements: Does an Easement to Operate a Vineyard Qualify?

The case of *Clos Farming Estates Pty Ltd v Easton*⁹¹ was another application of the *numerus clausus*, but in a novel way. Could the appellant, the developer of an estate comprising residences and a viticulture enterprise, exercise exclusive rights to plant a vineyard, cultivate it and harvest the grapes for wine production over the lots in a combined viticulture and residential development in which investors held the fee simples? The case raised directly the question whether this right could fit into the category of easement. Each lot in the estate comprised two parts: Part A, a residential component and Part B, a farming component. The respondents purchased one of the lots in the development (Lot 27) and contracted to allow viticulture enterprises to be carried out on Part B of their lot. The developer registered the Deposited Plan covering the estate in 1989 along with a section 88B instrument, detailing a number of restrictions. The restrictions included the Fourteenth Restriction, referred to as the ‘Easement for Vineyard’. Lot 86 of the development was retained by the developer as the benefited land, while all of the other lots in the development, including the respondent’s lot, were servient tenements. This Restriction purported to allow the owner of the

⁸⁶ [1994] 2 AC 310; [1994] 2 All ER 65.

⁸⁷ [1957] Ch 169.

⁸⁸ (2004) 11 BPR 21,149 [67]. See also *Thamesmead Town Ltd v Allotey* (2000) 79 P & CR 557.

⁸⁹ In *Cameron v Dalgety* [1920] NZLR 155 a servient tenement holder was obliged to contribute to the upkeep of the site of the easement though a successor in title on this ground.

⁹⁰ (2004) 11 BPR 21,149 [67].

⁹¹ (2001) 10 BPR 18,845.

benefited land to enter any burdened land and carry out viticulture works, harvest the grapes and then sell them.

In 1995, Clos Farming Estates lodged a caveat on Lot 27 purportedly to protect its rights as previously described in the 'Easement for Vineyard'. In 2000, the respondents sought to have the caveat removed from the title to Lot 27. Clos Farming then applied to the Court seeking a declaration that their interest was caveatable. The Respondents cross-claimed, seeking a declaration that the Easement for Vineyard was not a valid easement.

Certainly if the reasoning in *Tulk v Moxhay* were adopted, this contractual obligation would be enforced. The primary purpose of the arrangement was to retain the integrity, and therefore the financial viability, of the entire venture. In all likelihood, if subsequent purchasers were able to opt out, similar consequences would follow, as those predicted by Lord Cottenham in *Tulk v Moxhay*, namely that the vineyard would cease to be economically viable. Moreover, as Bryson J, the primary judge noted, the purchasers bought with full knowledge of the restriction because it was registered: 'Lot 86 is a peg on which to hang dominant ownership and steer the section 88B Instrument through the registration process'.⁹²

Bryson J went on to hold that no easement was created, concluding that the interest described in the Fourteenth Restriction was invalid because it failed both the second condition and the fourth condition referred to in *Ellenborough Park* for the creation of easements: that is, it failed to accommodate the dominant tenement, and the right was not capable of being the subject matter of a grant. It did not accommodate Lot 86 because the activities allowed under the Fourteenth Restriction could not be tied to the ownership of Lot 86 nor could they confer advantage or enhancement in respect of it. As for the requirement of being the subject matter of a grant, the intended interest did not qualify as an easement because it was inconsistent with the proprietorship of the servient owners. Bryson J concluded as follows:

On an overall view the Fourteenth Restriction is the keystone of a structure of restrictions which creates an estate in which lots are nominally held under freehold title but actually held subject to seigneurial rights which put all opportunities to carry out viticultural and agricultural activities in the hands of the dominant owner, for all the farming land in the estate, and leave the freehold owners in a servile powerless condition. This is a novel scheme of ownership with rights of ownership not known to the law. It is a re-invention, and an imposition on freehold title, of the substance of the scheme of manorial and copyhold title which existed in England centuries ago and has been abolished there, but was never introduced into Australia. In my opinion the law of easements cannot be used to change the nature of freehold ownership in this way and to create a substantially different kind of land title. The freeholders are neutralised and powerless, unable to control or in truth to

⁹² (2001) 10 BPR 18,845 [47].

influence what is to happen on their agricultural land. Putting the land to its highest and best use is impeded, to the detriment of the public interest as well as the interests of the freeholders.⁹³

The emphasis in this passage is on the first of the policies articulated by Lord Brougham in *Keppell v Bailey* for limiting the number of property rights: to prevent undue restrictions hampering the economic development of land. Bryson J's feudal references capture the rationale behind the rule. Yet in this case, the reverse was more probable, as it appeared likely that if individuals who were not parties to the original contract could escape the restrictions, the entire scheme, and the considerable investment that went into creating it, would be jeopardised. In Lord Cottenham's terms in *Tulk v Moxhay*, the scheme might be 'worthless' to the original covenantees. The caution to extending the boundaries of easements to include new usages is evident in His Honour's approach to the question of extending recognised categories of easements:

This is a field where analogies in case law can be as illuminative as statements of principle, and close analogies would be particularly helpful. I asked counsel for references to judicial decisions which illustrate the concepts of accommodation and of exclusion of proprietorship...On neither question were counsel able to refer to any decision which could be regarded as a close analogy.⁹⁴

Only 'close analogies' will suffice. The Court of Appeal unanimously agreed with this restrictive approach.

D Profits à Prendre

In the sphere of profits à prendre, recent authority also demonstrates reluctance on the part of the courts to expand the categories of existing interests. In *Permanent Trustee Australia Ltd v Shand*,⁹⁵ for instance, the right in question was conferred on investors in the form of a 'licence to plant, grow, tend, harvest and prepare for sale, macadamia nut trees' on a parcel of land. The investors lodged a caveat to protect their alleged interest in the land. For the caveat to remain on the title, it required a valid proprietary interest in support. Young J held that this type of right did not qualify as a profit à prendre. One key requirement of a profit is that the subject matter to be taken from land be either part of the land, such as soil or minerals, or the natural produce of the land. The subject matter of profits à prendre is therefore confined to naturally grown products – *fructus naturales* – and does not extend to the products of continuing human labour – *fructus industriales*. Where crops require regular tending and cultivation, they fall into the latter category. Young J concluded that because the nut trees needed

⁹³ Ibid [50].

⁹⁴ Ibid [26].

⁹⁵ (1992) 27 NSWLR 426.

cultivation after they had been planted, they could not qualify as a profit à prendre.⁹⁶

This conservative approach was affirmed in *Clos Farming Estates v Easton* where the plaintiffs claimed in the alternative to easements, that the rights to run a vineyard were profits à prendre. The primary judge, Bryson J rejected this argument, following *Permanent Trustee Australia Ltd v Shand*. He held that they were *fructus industriales*: after planting, the vines needed regular tending before harvest. The Court of Appeal unanimously agreed. This firm position against the broadening of property rights, consistent with the *numerus clausus*, was further evidenced in *Clos Farming* in the Court of Appeal's response to the final argument for the appellants to have their rights over the land recognised. They claimed that the alleged property rights could be recognised as a *sui generis* interest in land. The plea was rejected for the familiar reason that such obligations could operate in contract, but not property:

If such an argument were accepted, then it would be possible for many ordinary commercial arrangements to be given perpetual effect in rem merely because the original parties or the original developer possessed and made clear such an intention. The reluctance of Courts to recognise rights and interests in land that too greatly interfere with and limit owners' rights of exclusive possession strongly militates against such a result.⁹⁷

Undeniably, the claim to a new, *sui generis* category of property right was the most ambitious of all the plaintiff's arguments. But in relation to profits, it might have been possible to find a way of protecting the plaintiff's rights. Arguably, a better test would be that the *predominant* method of production is *naturalis* rather than *industrialis* instead of the present, very narrow approach. So, the sowing and harvesting of annual crops⁹⁸ would not qualify, but vineyards would. This result would offer a more effective remedy in for a recurring problem: that all those investors in developments are left without remedy, beyond their (usually illusory) remedies in contract.

The restrictive approach should be contrasted with that of Mason J in *Australian Softwood Forests v Attorney General*.⁹⁹ The case raised the question of the nature of an interest over pine trees growing on the land of another. The instrument that purported to grant the profit imposed an obligation to remove the trees from the land when they reached maturity, rather than a right to do so. Mason J held that:

I have not been able to discover a case in which an obligation to take something off a person's land has been considered to be a profit à prendre.

⁹⁶ See also *Lowe (Inspector of Taxes) v J W Ashmore Ltd* (1971) 1 Ch 545, 557 where the right was described as a natural process and one constituting 'the right to take part of the land or the creatures on it' (Megarry J).

⁹⁷ (2002) 11 BPR 20,605 [68] (Santow JA).

⁹⁸ As in *Myola Enterprises Pty Ltd v Pearlman* [1993] NSWSC No 3920 of 1993 (Unreported, Supreme Court of New South Wales Equity Division, Bryson J, 3 September 2003).

⁹⁹ (1981-82) 148 CLR 121.

But I do not think that this negates the possibility that the grower's rights amount to an interest in the nature of a profit à prendre.¹⁰⁰

Mason J took a broad view of the matter, concluding that the interest created was 'something in the nature of a profit à prendre, if not a profit à prendre'. The effect of the arrangement in that case was, in Mason J's view, that property in the trees passed to the grower before planting, and he had an interest in land and a licence to enter the land in order to take possession of the fruits of his interest.¹⁰¹ This more expansive interpretation of the category of profits is very much at odds with the later case law.

It is difficult to see a sound policy reason why such a sharp, and narrow, distinction between *fructus naturales* and *industriales* should be maintained. If investment in such industries is to be encouraged, investors should be fully protected by means of acquiring property rights. The restrictiveness of this approach is starkly at odds with one of the policy reasons for introducing the *numerus clausus*, and its defence in *Keppell v Bailey*: that more productive uses of land be encouraged. For this reason, the case law displays an element of rigidity to it. Surely, the predominant factor in the growth of the trees in *Permanent Trustee v Shand* and the grapes in *Clos Farming Estates v Easton* is provided by nature; cultivation is a lesser element. Applying this more flexible approach to the notion of what is natural would have rendered a fairer result. And ample authority exists to support this approach. In *Myola Enterprises Pty Ltd v Pearlman*, for instance, Bryson J held that the long cycle of production of trees makes them *fructus naturales*.¹⁰²

VI CONCLUSION: IS IT TIME TO RECONSIDER THE TRADITIONAL APPROACH?

The cases discussed above demonstrate that Australian courts in recent times have strongly resisted invitations to expand the range of proprietary interests in land. In consequence, the range of available property interests appears to be markedly 'sub-optimal'. It is difficult to identify sound policy reasons for not opening, if only incrementally, the presently closed list of property interests to *any new entrants*. At any rate, the reasons advanced by Lord Brougham and Chief Baron Pollock no longer retain the force they did, as the key mischief they identified for retaining the *numerus clausus* has been removed by Torrens registration systems.

Furthermore, if the reasons advanced by Lord Cottenham in *Tulk v Moxhay* for recognising novel proprietary interests retain any force, as I think they should, (that is, inexcusable damage to covenantee, prevention of unconscionable

¹⁰⁰ Ibid 132-3.

¹⁰¹ At first instance in *Corporate Affairs Commission v Australian Softwood Forest Pty Ltd* [1978] 1 NSWLR 150 Helsham CJ in equity concluded that there was no profit à prendre.

¹⁰² [1993] NSWSC No 3920 of 1993 (Unreported, Supreme Court of New South Wales Equity Division, Bryson J, 3 September 2003) [7].

commercial behaviour, notice by the purchaser of third party rights, and enhancement of the economic or other values of the land), then they ought not to be confined in their application exclusively to the negative freehold covenant. Where these factors appear in other instances, as in contractual licences, positive freehold covenants, easements for vineyard, or profits in the form of rights to take the produce of nut trees, there is now a more compelling case for recognising their proprietary status. As the facts of these cases have shown, where the precise detail of such rights either were, or could easily have been, contained on the register for all prospective purchasers to see, third parties are not likely to be disadvantaged by them, and the land, far from being rendered unproductive or constrained by such rights, is as likely to be enhanced both in value and amenity by their recognition.

My argument against the position advanced in these cases should not be taken to imply that I am in favour of judicial legislation in this area of the law. Because of the prime importance for certainty of the boundaries of property, property rights should not be routinely modified, revised or added to, by judges.¹⁰³ The kind of root-and-branch revision of the range of property interests displayed in *Tulk v Moxhay* is better left to, and undertaken by, legislatures, as is demonstrated by the uncertainty and judicial disagreement that that decision generated over the latter half of the 19th Century in England. So the enactment in 1987 in New South Wales of amendments to the *Conveyancing Act* defining forestry rights and carbon sequestration rights as 'profits à prendre' is a preferable solution to the problem than a judicial reworking of the boundaries of the profit would be.¹⁰⁴ Furthermore, by s 88EA(2) registration is required for such an interest to become effective. The imposition of this requirement is important: it addresses the problem of the creation of property rights in overriding statutes which resurrect many of the inefficiencies that the Torrens system was designed to remove. And additional legislative intervention, with consequential mechanisms for registration, would be beneficial to increase further the range of property interests in light of arguments above. But to acknowledge the centrality of legislation to reform in this area of law should not mean that judges have no role in developing the law in cases where authorities are unclear. In particular, the rationales offered so frequently in these cases for not allowing doctrine to evolve should be given far less weight than is evident in the recent case law. As a result of reliance on outdated policy, property law has become unduly rigid. In this context Susan Bright has identified an apparent conflict of policies across the range of proprietary interests:

¹⁰³ On the importance of this policy, see Kirby J in *Fejo v Northern Territory*:

¹⁰⁴ *Conveyancing (Forestry Rights) Amendment Act 1987* (NSW). See now *Conveyancing Act 1919* (NSW) ss 87A, 88AA, 88AB.

The malleability of the estate is to be contrasted with the rigidity of other, non-estate interests in land. The inheritance of a closed group of property rights has led to a blinkered development of the law and an absence of vigorous critical debate about the essential qualities of property... The response [to Lord Brougham's dictum in *Keppell v Bailey*] was to bolt the door on existing categories. It is about time that the door was opened and new rights admitted on a more principled basis.¹⁰⁵

The resistance of property law to such new interests is particularly perplexing given that all the rights identified above in recent case law, and excluded from the property list, are perfectly acceptable, and enforceable, in the regime of contract. A striking contradiction therefore appears in the legal doctrine of our liberal regime of private law: contract's *numerus apertus* [open] metaprinciple stands alongside, but in stark – and increasingly indefensible – opposition to, property's *numerus clausus*.

105 Bright, above n 49, 546. See also Gray and Gray, above n 17, 635.