

The Future for Rural Landsharing Communities in Far North Coast New South Wales

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Introduction

Rural landsharing communities¹ (RLCs) have proliferated throughout the Far North Coast of New South Wales since 1973. Initially illegal, this particular form of multiple occupancy eventually achieved legislative recognition through the enactment of the *State Environmental Planning Policy No 15 – Rural Landsharing Communities 1988* (NSW).

While many RLCs have survived for over three decades they are only now being confronted by generation change. Until 1989, the main legal structures available for RLCs were the existing forms of joint ownership such as cooperatives, company title, trusts, tenancies in common and joint tenancies. The nature of these legal titles, although inappropriate for the purposes of communal living, was immaterial while community members lived in harmony. However, as early as ten years after the beginning of the RLC movement, the likelihood of disputes among members was foreseen.² It was noted that, when disputes over equitable interests in land eventually occurred, “[existing joint ownership structures will] fail to provide an adequate and equitable solution, if any.”³

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1 Terminology can be confusing. The movement towards the creation of communal societies has recently been described as Communitarianism. Its adherents have been variously described as communards, communitarians, hippies, and community members. Among the terms that have been used to describe these communities are communes, intentional communities, rural cooperatives, hamlets, ecovillages, multiple occupancies, and the term used in this article, rural landsharing communities.

2 Land Commission of New South Wales, *Multiple Occupancy Development – Feasibility Study*, NSW Government, Sydney, June 1984, p 7.

3 Land Commission of NSW, note 2, p 9.

In 1989 the New South Wales Government enacted the *Community Land Development Act 1989* (NSW) and the *Community Land Management Act 1989* (NSW), jointly referred to in this article as the “community title legislation”. The community title legislation is viewed by many as the solution to community disputes relating to the transfer of equitable interests by sale or succession.

This paper considers two issues associated with generation change in RLCs:

- The adequacy of legal structures, other than community title, for the survival of RLCs.
- The potential for the survival of RLCs through community title.

A short history of communal living

‘Community’ is an often-used word commonly referring to either a group of people living in a geographical area or a group of people with shared interests. The history of Australia and the world generally includes the history of many communities, not the least being those of the Australian Aborigines. History also records many examples of religious communities. In this article, the terms ‘community’ and ‘communal living’ refer specifically to those secular, non-Indigenous communities comprised of people who are sometimes referred to as ‘alternatives’ and whose communities are RLCs.

RLCs were established throughout many parts of rural New South Wales in the years following the 1973 Aquarius Festival⁴ held in the Far North Coast village of Nimbin.

These RLCs were not the first examples of communal living. Although communal living is often thought of as a rare form of social life, such thinking is demonstrably inaccurate. Communal societies in one form or another have existed within larger societies in both Asia and the West for over three millennia.⁵

⁴ The Second Bi-annual Arts Festival of the Aquarius Foundation of the Australian Union of Students.

⁵ Zablocki B, *Alienation and Charisma – a study of contemporary American communes*, Free Press, New York, 1980, p 24.

The first recorded secular community in Australia was at Hahndorf in South Australia. The community survived only briefly but its founder, Johann Krumnow, went on to establish a community called Herrn Hut near Hamilton in Victoria in 1853. This community, based on the sharing of equipment and money, lasted 44 years. According to Metcalf, it ceased only because the community was unable to attract new members or retain enough of their children to survive beyond the death of the first generation.⁶ The issue of generation change in post-Aquarius RLCs will be examined in greater detail later in this article.

Communal living represents an ideal that, on the one hand, has failed to find widespread acceptance yet, on the other, has always attracted a fervent minority of adherents. Communal societies are often perceived as “shortlived and unmomentous”. Zablocki, however, points out “although they have not left an indelible mark on the course of human history, they can justly argue that they have had a significant impact on their surrounding environment.”⁷ While there is no research on the impact of the RLC movement on its surrounding environment, there has been substantial growth in population, service industries, economy and population throughout the Far North Coast region since the year of the Aquarius Festival and the subsequent emergence of the RLCs.

The following table indicates, approximately, the number of legal RLCs in 1994 within the six local government areas comprising the Far North Coast.⁸

⁶ Metcalf B (ed), *From Utopian Dreaming to Communal Reality*, UNSW Press, Sydney, 1995, pp 16-17.

⁷ Zablocki B, note 5, p 24.

⁸ Lismore City Council, *Discussion Paper on Multiple Occupancy of Rural Land in Lismore City Council Local Government Area*, (unpublished), June 1994, p 6.

Local Government Area	Number of RLCs
Lismore	60
Tweed	25
Kyogle	17
Ballina	0
Richmond River	3
Byron	15
Total	120

A brief note on research methodology

Researching the alternative lifestyle movement, including RLCs, is problematic. Numerous researchers have noted that survey research techniques are rarely suitable because the subject participants can be difficult to locate, do not necessarily speak for their entire community, and are often either dubious of or strongly opposed to scientific methods.⁹ Consequently, data such as that presented in the above table tends to be collected infrequently, flawed and dated.

Many of the legal issues discussed in this article originate from the author's close involvement with the Far North Coast alternate community over many years. In the author's view, they are sufficiently important to consider despite the lack of empirical evidence.

In addition to the review of surveys, normal legal research methodology using legislation, case law, reports and secondary resources has been applied.

⁹ Metcalf WJ & Vanclay FM, *Social Characteristics of Alternative Lifestyle Participants in Australia*, Institute of Applied Environmental Research, Griffith University, Nathan, 1987, p 5.

Aims of RLC founders

The impetus for RLCs lay in the prevailing social, political and economic conditions in Australia in the late 1960s and early 1970s. Analysis of the reasons for this social development, as with overseas communities, has been the subject of detailed research that can only be touched upon here.

Munro-Clark saw the emergence of RLCs as partly arising from the angst “aroused in modern men and women by an excess of freedom.”¹⁰ She suggested this angst had led to a fragmentation and weakening of belief and value systems, and that the purpose of RLCs was to provide their members with “cognitive support”.¹¹

Cock’s definitive study, *Alternative Australia*, identified “two pillars of the alternative philosophy ... the search for personal power ... and the search for community power.”¹² Personal power included control over one’s health, personal fulfilment, religion, environmental concerns and alternative technologies. Community power was characterised by consensual decision-making, minimalism and an interest in returning to communitarian values. These values could be likened to those found in what Tonnies broadly refers to as a *gemeinschaft* society.¹³ In such a society persons have interactions with a small number of people well known to them through a variety of transactions, and thus the distinction between the private and public realm becomes blurred. Those choosing to live on RLCs were turning away from a *gesellschaft* society wherein a person does not know anything about other people except through their specific function such as a baker, an electrician, a lawyer or a bus driver.¹⁴ Tonnies’ description is important in the context of this paper because while RLC survival may be assured, it might be as a *gesellschaft* rather than a *gemeinschaft* society.

10 Munro-Clark M, *Communes in Rural Australia*, Hale & Ironmonger, Sydney, 1986, p 25. Note that the author, using the terminology of the time, refers to RLCs as ‘communes’.

11 Munro-Clark M, note 10, p 26. Munro-Clark, utilizing the terminology of the time, refers to RLCs as ‘Multiple Occupancies’ or ‘MOs’.

12 Cock P, *Alternative Australia*, Quartet, Melbourne, 1979, p 224.

13 Tonnies F, *Community and Association*, Routledge, London, 1955, p 87.

14 Ife J, *Community Development – creating community alternatives – vision, analysis and practice*, Melbourne, Longman, 1995, p 16.

There have been many attempts to characterise the types of RLCs that emerged in this period. Two significant studies were those undertaken by Cock and Metcalf. Cock saw RLCs as either religious or secular. Religious communities could be based on either Eastern or Western religions. Secular communities were either “survival communities” or “bourgeois co-operatives”.¹⁵ Metcalf created a typology based on three types of community: spiritual, political and secular.¹⁶ An analysis of these findings is outside the scope of this article.

The post-Aquarius legal environment

Prior to 1973 there was no legislative recognition of communal living. Land development for multiple occupancy was regulated by a variety of policies¹⁷ relating to subdivision and residential development in non-urban areas, worker’s dwelling houses, planning in fire-prone areas, smallholding and cooperative agricultural developments, and dwelling houses in rural areas. Before 1980 planning legislation permitted one house per 40 hectares (100 acres) on rural land. Confronted with this situation, new settlers chose to build illegally while simultaneously campaigning for planning legislation to permit communal sharing of land.

It was not until 1980 that the legal means were created to enable RLC development. As a result of intense lobbying, Paul Landa, Minister for Planning in the New South Wales Government, held a “Hamlet Seminar” in Lismore¹⁸ in December 1979. Soon afterwards the Lismore City Council’s Interim Development Order was amended to enable multiple occupancy for communal living within certain zoned areas in the northern parts of the local government area.¹⁹ The amendment granted immediate approval to 23 RLCs either planned or

¹⁵ Munro-Clark M, note 10, p 122.

¹⁶ Munro-Clark M, note 10, p 123.

¹⁷ State Planning Authority (circulars 67, 74, 76 & 80), Department of Environment and Planning (circulars 74, 77 & 83) and Planning and Environment Commission (circulars 13,35 & 44).

¹⁸ NSW Planning & Environment Commission, *Hamlet Development in NSW – Seminar Proceedings*, NSW Planning & Environment Commission, Grafton, 1980.

¹⁹ Lismore City Council, note 8, p 4.

existing at the time, thereby making these the first legal RLCs in the post-Aquarius period.

Development of RLCs was now permitted in an area confined to certain local government parishes behind what was colloquially referred to as “the hippie line”.²⁰ Development in this region was permitted on areas not less than 40 hectares. The land was to remain unsubdivided and to be owned in its entirety in common by at least two thirds of all adult persons residing on the land. Residential density was restricted to one person per hectare.²¹

The most significant legal instrument for the communal movement was the *State Environmental Planning Policy No 15 – Rural Landsharing Communities 1988* (NSW) (*SEPP 15*), introduced by the New South Wales Labor Government in 1988. Its aims were to encourage the collective ownership of land, with an emphasis on the construction of low cost dwellings and an environmentally sensitive approach to community based rural settlement.

The impact of *SEPP 15* can be seen in the following table of RLC development applications to the Lismore City Council.²²

Year	Applications	House Sites²³
1980	3	62
1981	3	20
1982	5	68
1983	4	160
1984	4	70
1985	1	10
1986	7	91
1987	4	19
1988	9	44

20 Boorabee, Bungabee, Jiggi, Hanging Rock, Terania and Whian Whian.

21 Lismore City Council, note 8, p 4.

22 Lismore City Council, note 8, p 6.

23 Indicative only and relates to approved sites.

1989	10	17
1990	7	19
1991	3	8
1992	5	41

SEPP 15 was repealed in 1994²⁴ by the New South Wales Coalition Government but reintroduced by the Carr Labor Government in 1998 in a slightly revised form, including a change in nomenclature from “multiple occupancies” to “rural landsharing communities”. In the period between 1994 and 1998 existing RLCs often met resistance to further development of their land, and proposals for new RLCs remained in limbo.

The aims of the current *SEPP 15*, as set out in clause 2, may be stated as:

- To encourage and facilitate the development of rural landsharing communities to environmentally secure and sustainable land practices.
- To enable people to collectively own a single allotment of land and use it as their principal place of residence.
- To enable the erection of multiple dwellings on the allotment and the sharing of facilities and resources to collectively manage the allotment.
- To enable the pooling of resources, particularly where low incomes are involved, to economically develop a wide range of communal living opportunities, including the construction of low cost buildings.
- To facilitate development, preferably in a clustered style, in a manner that both protects the environment and does not create a demand for the unreasonable or uneconomic provision of public amenities or public services.
- To facilitate development, preferably in a clustered style, in a manner that does not involve subdivision, strata title or any

²⁴ *State Environmental Planning Policy No 42 – Multiple Occupancy of Rural Land (Repeal) 1994* (NSW).

other form of separate land title, and in a manner that does not involve separate legal rights to parts of the land.

- To create opportunities for an increase in the rural population in areas that are suffering or are likely to suffer from a decline in services due to rural population loss.

SEPP 15 stipulates the limitations of density and land use,²⁵ matters for consideration by local councils,²⁶ provision of management plans taking into account water and waste management, soil erosion prevention, bushfire management, protection of flora and fauna, and the provision and maintenance of internal roads.²⁷ Clause 3 lists the local government authorities covered by the policy²⁸ and the land to which the policy does not apply, such as national parks, sensitive coastal environments and important Aboriginal sites.²⁹

Of the six local government authorities comprising the Far North Coast, only Byron Shire Council sought and was granted exemption from *SEPP 15*. Byron Shire Council has not forbidden the future development of RLCs but has sought to control their existence through its Local Environment Plan 1988³⁰ and Rural Settlement Strategy 1998.³¹ Byron Shire Council's approach to communal living is considered in more detail later in this article.

Under *SEPP 15*, RLCs could neither subdivide their land nor create separate legal rights to part of the land. Accordingly, the most popular

25 *State Environmental Planning Policy No 42 – Multiple Occupancy of Rural Land (Repeal)* 1994 (NSW), cl 7.

26 *State Environmental Planning Policy No 42 – Multiple Occupancy of Rural Land (Repeal)* 1994 (NSW), cl 9.

27 *State Environmental Planning Policy No 42 – Multiple Occupancy of Rural Land (Repeal)* 1994 (NSW), cl 10.

28 *State Environmental Planning Policy No 42 – Multiple Occupancy of Rural Land (Repeal)* 1994 (NSW), Schedule 1.

29 *State Environmental Planning Policy No 42 – Multiple Occupancy of Rural Land (Repeal)* 1994 (NSW), Schedule 2.

30 *Byron Local Environment Plan*, 1988.

31 *Byron Rural Settlement Strategy incorporating Best Practice Guidelines and Performance Standards*, 1998.

forms of legal structure chosen from those available to RLCs included cooperatives, company title, and trusts.³²

Cooperatives are governed by the *Cooperatives Act 1992* (NSW). As self-help democratic organisations where each member has equal voting rights under the Act, the cooperative structure appeared consistent with the post-Aquarius spirit. Membership is open to anyone without discrimination and the primary aim is service provision, not profit. Incorporation occurs under the Act and is administered by the Registrar of Cooperatives. In cooperatives, provision is made for members to have a space in which they can build their home subject to whatever rules have been created by the community, while the remaining land is for common use. Typically, the common land contains communal meeting, eating and recreational areas. One of the largest communities established immediately after the Aquarius Festival was the Coordination Cooperative at Tunttable Falls, ten kilometres from Nimbin.

Company title, popular as a form of multiple dwelling ownership prior to strata title, enables an RLC to be owned by a company incorporated under the *Corporations Act 2001* (Cth). The constitution gives members the exclusive right to occupy certain parts of the land on which they can, as with cooperatives, build their homes subject to whatever rules the community has created. The balance of the land is for common use, for example, communal meeting, eating and recreational areas.

Trusts enable legal title to be held by a person, group or company for the benefit of the community, often a voluntary association. The trust deed normally grants members rights similar to those available in cooperatives and companies.

Each of these legal vehicles precludes a member from holding a registrable interest in the land and a certificate of title in respect of their individual share.³³ The absence of individual title not only meets the requirements of *SEPP 15*, but also is usually consistent with the goals of the community. However, it has led to the problem of generation change now confronting RLCs.

³² Munro-Clark M, note 10 pp 212-215. Her study includes other legal structures but these three were the most common.

³³ Until the advent of Community Title Legislation in 1989, the only legal structures which provided for individual CTs were tenants in common and strata title.

The challenge of generation change

Metcalf identified 50 communal groups established throughout Australia prior to the “Aquarius Age”.³⁴ Very few lasted more than a few years, and even those that lasted longer “eventually collapsed, unable to imbue second and third generations with their utopian zeal.”³⁵

According to Metcalf, a small number of post-Aquarius RLCs have continued into the second generation, suggesting that survival may be possible.³⁶ However, it is unclear what Metcalf means by ‘survival’. An RLC may survive generation change by becoming a *gesellschaft* community, where the individual rather than the group is paramount, but not as a *gemeinschaft* community, where the emphasis is on the group. More study needs to be undertaken on the issue of generation change as it appears that the aging of the population may well have a serious impact on these communities.

The manner in which RLCs survive generation change will be determined, to some extent, by their criteria for membership. In this regard, there appear to be a number of hypotheses. These include:

- RLCs with an “open door” approach may find it relatively easy to match buyer and seller in the marketplace and to deal with issues relating to succession. However, this may occur at the expense of a group orientation.
- RLCs with a “controlled membership” approach, seeking to control membership by applying goal-related criteria, may struggle to survive generation change with their group orientation intact.

In the “open door” approach to membership, RLCs allow the marketplace to determine membership, the assumption being that if people are prepared to pay for an equitable interest in the community they should not be turned away. In such communities emphasis is usually placed upon each member’s individual needs, and it is difficult to maintain the binding structure found in communities having a screening process for potential members. Lacking social solidarity,

³⁴ Metcalf B, note 6, p 40.

³⁵ Metcalf B, note 6, p 40.

³⁶ Metcalf B, note 6, p 40.

these communities experience transient relations and high turnover. While such communities may continue to be a species of multiple occupancy in the broad sense, the essential community spirit of the post-Aquarius age, as expressed in the original objectives, may well be lost.

In the “controlled membership” approach to membership, RLCs seek to control membership by measuring the appropriateness of aspiring members against certain goal-related criteria. Typically, this involves a period of trial residence on the RLC during which the members of the RLC and the aspiring member have the opportunity to learn more about each other.

Open Door Approach *Controlled Membership Approach*

Many RLCs will be located somewhere *between* these two polarities. Some may be inclined towards an open door policy yet still apply a degree of discretion in selection, while others with a strong interest in controlling their membership may apply the process with less rigour. RLCs located towards the “open door” approach end of the continuum may increase their potential for survival, but at the price of becoming little more than subdivisions. As to those RLCs located towards the “controlled membership” approach end, seeking to maintain their objectives and retain the post-Aquarius spirit, their survival is problematic.

While acknowledging that a community’s objects need to be fluid, continually reviewed and, where appropriate, revised, the fact remains that many RLCs risk social disintegration unless the community can exercise control over membership. In this regard, the laws relating to succession and equitable interests in land are of great importance. With respect to cooperatives, company title and trusts, the laws relating to interests in land afford primacy to the individual³⁷ and thus pose a threat to RLC group values.

In the case of death, for example, the inheritance of a share in a community can cause a problem. The community may enjoy having a person as a member, but might not be overly enthusiastic about that person’s daughter or son if they do not share the community’s values.

³⁷ As does the law, generally.

In the case of a community member wishing to leave, the reason for departure may be that the person feels alienated from the group or that the departing member's goals and those of the community have diverged. It is not uncommon for departing members, acutely aware of the exponential growth in the cost of housing in "the real world", to focus on receiving adequate compensation for their home. At this point, conflict may arise between the rights of individuals wishing to dispose of their interests in a manner optimising their financial return, and the rights of the group seeking to control incoming membership. Putting it bluntly, departing members will be thinking about themselves, while community members will be focusing on their collective future and the question of who will be the incoming member.

Unless a legal solution that focuses on the needs of the group as well as the individual can be found, self interest will give rise to what Durkheim refers to as "transient relations and passing association."³⁸

Community Title Legislation – the way forward for communities?

In 1989 the New South Wales Government introduced its community title legislation.³⁹ Similar legislation exists in other states. In his Second Reading Speech the Minister for Natural Resources said:

Generally known as the community titles legislation, the bills will introduce a new form of subdivision in New South Wales and will permit greater innovation in subdivision design and greater flexibility in residential, commercial and industrial development.

For many members of RLCs, community title presents a significant advantage over the other forms of legal title because it enables members of an RLC to obtain a registrable interest in the land, and thus their own individual certificate of title. The fact that a member receives an individual certificate of title is viewed as an advantage

³⁸ Durkheim E, *The Division of Labour in Society*, MacMillan, New York, 1933, p 79.

³⁹ *Community Land Development Act 1989* (NSW) and *Community Land Management Act 1989* (NSW).

because it enables the member's interest in the land to be mortgaged, transferred or inherited.

Community title was not specifically designed for the benefit of people seeking to create an RLC. The 1989 legislation was drafted having in mind small non-stage urban schemes, larger scale multi-staged urban schemes, and rural resorts. The community title legislation was designed "to promote new levels of sophistication in land development, to preserve the best features of the local landscape and to provide shared amenities for home owners which, on an individual basis might be otherwise prohibitively expensive."⁴⁰

Section 15 of the *Community Management Act 1989* (NSW) binds members of the association to any development contract registered with a community, precinct or neighbourhood as if it included an agreement under seal with covenants. Any attempt to exclude, modify or restrict the operation of the covenants is void,⁴¹ while the covenants do not affect any right or remedy a person has otherwise than under the covenants.⁴² The effect of the section is that members can preserve the 'theme' of their community.

Section 17 of the *Community Management Act 1989* (NSW) provides for the making of by-laws relating to the "control or preservation of the essence or theme." This could be achieved through limiting occupancy to persons of a particular description, fixing the architectural, building or landscaping styles permitted, limiting the kind of materials that may be used in buildings and other structures, requiring that specified association property be used only for particular purposes, or imposing other kinds of restrictions.

If an association is satisfied that a proprietor or occupier of land has contravened a provision in the by-laws, the association may serve a notice on such person requiring compliance with that provision.⁴³ The notice must be in a form approved by the Director-General. A person may be fined by the tribunal for failing to comply with a notice under this section.⁴⁴

⁴⁰ Hawthorne L & McFadzean S, *Community Titles – Law and Practice*, Land Titles Office, Sydney, 1991, pp v-vi.

⁴¹ *Community Land Management Act 1989* (NSW) s15(4).

⁴² *Community Land Management Act 1989* (NSW) s15(5).

⁴³ *Community Land Management Act 1989* (NSW) s13A.

⁴⁴ *Community Land Management Act 1989* (NSW) s97C.

The *Community Management Act 1989* (NSW) enables members to hold a proprietary interest in the land, and that interest is registrable under the *Real Property Act 1900* (NSW).

The preservation of a community theme and the provision of individual certificates of title have led many to believe that community title provides the first suitable legal structure for RLCs.

Byron Shire – a case study

Byron Shire was the only local government authority on the Far North Coast to be granted exemption from *SEPP 15*. Thus, the council can control the development of RLCs under its Local Environmental Plan 1988⁴⁵ (the plan) and Rural Settlement Strategy 1998 (the strategy).

Section 17A of the plan identifies certain land within Byron Shire designated for RLC purposes. Section 17A(2) of the plan uses the same wording as *SEPP 15* in relation to its overall policy aims. Clause C of the plan requires communities to implement their policies in compliance with the strategy.

The strategy identified four different types of rural settlement, namely:

- Rural Small Holdings
- Rural Community Title (Town Catchment) Settlement
- Rural Community Title (Village Catchment) Settlement
- Rural Landsharing (Multiple Occupancy) Communities.

The strategy requires most⁴⁶ rural settlement to be by way of either community title or multiple occupancy. Future multiple occupancy communities have been restricted to small areas in the north and west of the shire. Existing multiple occupancy communities in the newly identified Rural Community Title zones have been invited to apply to convert their land to community title.⁴⁷

⁴⁵ In pursuance of the *Environmental Planning and Assessment Act 1979* (NSW).

⁴⁶ Except specifically identified smallholdings.

⁴⁷ 16 applications for conversion from RLC to Community Title are currently on public exhibition as part of Byron Shire Council's LEP amendment process.

Rural Community Title in both town and village catchments is based on the following objectives:

- To ensure a catchment management and planning approach which fosters a community sense of place.
- To encourage the economic and social development of rural communities.
- To manage natural systems such as creeks, native vegetation, flora and fauna ... and to provide environmental repair.
- To ensure compatible land use and lifestyle aspirations among residents within a rural community by allowing for appropriate theme development.
- To encourage self-reliance.

Byron Shire Council introduced community title largely to ensure environmental protection. The council's position is that *individuals* will not look after rural land: therefore, a *community* management plan is the best means of ensuring the protection of the environment.⁴⁸

Community Title – issues for RLCs

The community title legislation appears, on the surface, to encourage the survival of RLCs. It provides for ease in the transfer of property interests by sale or inheritance. Simultaneously, it enables a community to control its future by, among other things, “limiting occupancy to persons of a particular description.”⁴⁹

However, the high demand for community title land in Byron Shire⁵⁰ appears less to do with an interest in community living than with the acquisition of a legal interest in property located in an attractive rural region. While more research is needed on this point, it may well be that a lack of commitment to post-Aquarius goals is causing some communities to soften their management agreements when converting

⁴⁸ Perinotto T, “Hippie land deals coming in for a clean up” , *The Australian Financial Review*, 3 October 2003, p L13.

⁴⁹ *Community Land Management Act 1989* (NSW) s17.

⁵⁰ Perinotto T, note 48, p L13.

their land to community title. Because of the perceived absence of inhibiting transfer factors such as the strict membership requirements of s 17 of the *Community Management Act 1989* (NSW), community title development south of Byron Bay has become, according to one local real estate agent, “millionaires row”.⁵¹

Recent case law suggests another problem looming for communities under community title relating to the terms of s 28 of the *Environmental Planning and Assessment Act 1979* (NSW) (*EP&A Act*). Section 28 reads:

(1) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.

Under the *EP&A Act*, a regulatory instrument is defined as:

[A]ny Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.

Does s 28 of the *EP&A Act* extend to limiting the rights of a community to enforce by-laws relating to its “control or preservation of the essence or theme” under s 17 of the *Community Land Management Act 1989* (NSW)? Two recent cases suggest s 28 enables an environmental planning instrument, such as a Local Environmental Plan (LEP), to override any by-laws placing restrictions on development that is otherwise in accordance with the *EP&A Act*.

In *Coshott v Ludwig*,⁵² the Court of Appeal held that the combined effect of s 28 of the *EP&A Act* and a council’s LEP was to nullify and remove all obstacles to the planning principles that had been decided by the relevant council.

⁵¹ Perinotto T, note 48, p L13.

⁵² *Coshott v Ludwig* (1997) NSW ConvR 55-810.

In *Coshott v Ludwig*, the Coshotts and their neighbours, the Ludwigs, had entered into a restrictive covenant whereby the Ludwigs could not build anything larger than “a cottage” on their land. Subsequently, the Ludwigs lodged a development application with the Woollahra Municipal Council. The council approved the application, thereby permitting building work to such an extent that the Ludwigs’ house could no longer be described as “a cottage”.

Clause 32 of the council’s LEP stated:

(1) For the purposes of enabling development to be carried out in accordance with a consent granted under the Act, any agreement, covenant or instrument imposing restrictions as to the erection or use of buildings for certain purposes, to the extent necessary to serve that purpose, shall not apply to the development.

In finding for the Ludwigs, the court held that s 28 of the *EP&A Act* effectively permitted an environmental planning instrument to state what documents could be disregarded. In the instant case, the council’s LEP “is stating that one type of document to be disregarded is a document creating a restrictive covenant.”

In a more recent decision, *Horizons Corporations Law Pty Ltd v Rizons Pty Ltd*,⁵³ a Master of the Supreme Court affirmed the effect of s 28 of the *EP&A Act*, and held that it extends to covenants and agreements under a community management statement pursuant to the *Community Land Management Act 1989* (NSW).

In *Horizons Corporations Law Pty Ltd v Rizons Pty Ltd*, the plaintiff and first defendant had entered into an agreement relating to the development of two parcels of land within a resort. The Port Stephens Council approved a development application that included development which was contrary to the terms of that agreement.

The decision in *Coshott v Ludwig* regarding the breadth of s 28 of the *EP&A Act* was affirmed by McLaughlin M. The effect of s 28, when applied in conjunction with s 34 of the Port Stephens Council’s LEP (the wording of which was similar to Woollahra Municipal Council’s LEP in *Coshott v Ludwig*), was to “absolutely preclude” the plaintiff from obtaining relief.

⁵³ *Horizons Corporations Law Pty Ltd v Rizons Pty Ltd* (1999) NSWSC 691.

Master McLaughlin examined the effect of the enactment of the community title legislation on the earlier *EP&A Act*. He rejected the plaintiff's submission that the earlier *EP&A Act* had impliedly repealed s 28. In his view, while the community title legislation had created a discrete system of title with respect to land, the *EP&A Act* had created public rights and duties by regulating development upon land held under any of the various systems of title.

Based on these cases, it is possible that agreements forming part of a community management plan will be nullified whenever they conflict with an environmental planning instrument or a development application approved by council. However, s 28 of the *EP&A Act* will only affect "a regulatory instrument if, and to the extent that, the regulatory instrument expressly, or by necessary implication, conflicts with the environmental planning instrument."⁵⁴

Conclusion

The major themes of this article have been:

- Prior to the enactment of community title legislation, RLCs selected legal structures that had been created for other purposes but which largely met the needs of the first post-Aquarius generation.
- Although it was created for other purposes, community title legislation has been viewed by some RLC members as a way of surviving generation change.

The conclusions drawn by the author are:

- Only through an "open door" membership policy can RLCs hope to avoid the legal issues relating to the transfer of a member's equity by sale or succession. Adopting this policy, an RLC may survive as a multiple occupancy. However, the essential community spirit of the post-Aquarius age, as expressed in the original objectives, is likely to be lost.

⁵⁴ Pounder L, *Planning Principles versus private property rights – The scope and effect of Section 28 of the Environment Planning and Assessment Act 1979 (NSW)*, unpublished, 2004, p 3.

- The use of community title schemes as a legal vehicle for RLCs has the potential to assist these communities in a smooth transition beyond the first generation of members. However, there are a number of ways in which community title may ultimately fall short, not the least being the application of s 28 of the *EP&A Act* to management agreements.

Should we be concerned? These are uncertain times. Insecurity in political, social, environmental and other aspects of human life has, it seems, led to a greater emphasis on individual needs at the expense of the community.

In a recent newspaper article Kitney opined:

[I]n these hedonistic and self-focused times, broader issues of community interest, equity and minority rights are sidelined or given lower priority. ... Australians are less fussed now about the threat of global warming than they used to be.⁵⁵

RLCs, insignificant as they may seem from a national perspective, contribute in numerous ways. At a time when rural Australia is under threat economically and environmentally, and the supply of low-cost urban housing is in decline, RLCs provide positive alternatives to current land ownership practices.

In his 1979 Boyer Lectures, four years before becoming Prime Minister, Bob Hawke suggested that those seeking an “alternative lifestyle” should be supported in their endeavours as a means of reducing unemployment and providing low-cost housing. Hawke argued that, rather than representing a threat to the “conventional community ... [the alternative lifestyle] would be infinitely more likely to contribute to an harmonious society than the burgeoning of a

⁵⁵ Kitney G, “Selfish Australia votes for itself”, *Sydney Morning Herald*, 10 January 2004, <<http://www.smh.com.au/articles/2004/01/09/1073437467392.html?from=stories&oneclick=true>>, (accessed 10 January 2004).

disaffected body of unemployed to whom society pretends it has discharged its obligation by the signing of a dole cheque.”⁵⁶

After Hawke became Prime Minister, both Commonwealth and State Governments explored the idea of offering assistance to young people to help them join self-sufficient alternative lifestyle groups. The Land Commission of New South Wales had undertaken a feasibility study in 1980 to investigate the potential of state involvement in what was then referred to as multiple occupancy development.⁵⁷ The study eventuated in a short-lived pilot scheme that, like the proposed “Kibbutz Schemes”, was discontinued. According to Metcalf, this occurred partly because of “[the government’s] rather distorted and uniformly negative ‘collective memory’ of attempts to sponsor communes during the 1890s.”⁵⁸

In 1995 the New South Wales Department of Urban Affairs and Planning, in its manual on “best practice” for rural settlement,⁵⁹ identified the following positive attributes of RLCs:

- Thresholds to growth – RLCs cluster rural settlement thereby limiting the fragmentation of rural land.
- Natural environment – RLC settlement contributes to enhancing the natural features and ecological values of the region.
- Diversity of lifestyle – RLC settlement provides a sustainable option for rural living as an alternative to urban living.
- Character of identity – RLC settlement retains and enhances the rural character of the local area.
- Efficient servicing and self reliance – RLC encourages settlement which is located and designed to minimise social and economic costs of providing and maintaining services e.g. internal roads, solid waste disposal,

⁵⁶ Hawke R.J.L., “The Resolution of Conflict”, *1979 Boyer Lectures*, Sydney, ABC, 1979, p 47.

⁵⁷ Land Commission of NSW, note 2, p 6.

⁵⁸ Metcalf B, note 6, p 39.

⁵⁹ Department of Urban Affairs and Planning (DUAP), *Rural Settlement: Guidelines on Rural Settlement on the North Coast of NSW*, Sydney, DUAP, 1995, p 4.

wastewater disposal and maintenance of the natural environment.

- Enhancing existing rural development – RLC settlement contributes to the form, livability and viability of rural land.
- Quality of life – RLC encourages settlement design which promotes quality of living throughout the various stages of one's life.
- Awareness and responsible action – RLC settlement facilitates and encourages self-education and fosters community involvement in sustainable rural settlement.

These attributes present not only a positive assessment of life in many RLCs on the Far North Coast of New South Wales, but desirable attributes for rural settlement generally.

The significance of post-Aquarius RLCs lies in their ability to stimulate creative solutions to Australia's urban housing crisis and to its rural, economic, and environmental decline. For these reasons alone, RLCs should be considered worthy of appropriate legal protection. Such legal protection would best be provided by the enactment of legislation granting these communities paramount collective legal rights in relation to the transfer of members' equitable interests in land, whether such transfers are by way of sale or succession.