

PROPERTY OWNERSHIP IN THE ALTERNATIVE
ENVIRONMENT OF INTENTIONAL COMMUNITIES

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PREFACE

This Preface is more lengthy than "average" because of the need to make points about the thesis, which cannot be appropriately made in it.

The thesis is written from a sense of personal commitment. I am a "patriot", - I embrace the country in which I was born and reared, her friendly people, the Aboriginal culture to which she gave birth, her white sandy beaches, her glorious sunsets, and many other things - including the flowers, flies and jarrah forests of the (well-named) darling range nestled in her great south-west. Because I care about my country I hope that we will not despoil and destroy her through shortsighted greed and "progress", that we will practise a lifestyle and build institutions to pass down a good future to our descendants. Needless to say, much that I see happening, causes me concern.

However, because the Western democratic tradition allows (at least in principle) individuals to make choices about their beliefs, their lifestyle and their association with others of like mind, there is hope. It is possible for people to cooperate in evolving a lifestyle (or in other words, a religion) which is more sane by being less cluttered at the personal level and less ecologically clumsy. People of that mind are often inclined to establish or to join communities of an alternative nature. Many of those people and communities have asked my advice and assistance in their formation and in voluntary arbitration of their differences. It would have been of enormous value to them (and to me) if there had been available a handbook of some kind setting out various possible legal structures and the implications of each. So far as I could determine no such booklet existed in Australia, and the very thin and few volumes available from overseas were either inappropriate or too meagre. I hoped that someone would see the need and publish something to meet it. No one did.

My aims in carrying out this study were

1. to make contact with a range of differently-structured communities in Australia and take account of their views and experiences,
2. to consider structural alternatives with the environmental imperatives (external and internal) in mind,
3. to compile a handbook as a checklist of various factors and possibilities which can be considered in deciding on a suitable structure of property ownership (both rural and urban).
4. to avoid unnecessary technicalities, whilst at the same time remaining as accurate as circumstances allow,
5. to organise an outline for a larger, more detailed and complete study of the issues in the future.

In undertaking this study I have grappled with a number of difficulties encountered along the way.

I have had to reconstitute myself into a one-man multidisciplinary team and attempt to present the results of that team's research in a way which would be understood by a mixed audience of both legally-trained and lay personnel. The absence of literature

directly on the central issues researched, meant that an original trail had to be blazed. Getting information from those who are directly involved, usually required face-to-face contact. Most alternative lifestylers have opted out of "straight" society to escape the slings and arrows of outrageous bits of paper, questionnaires, forms and bureaucracy. In addition, many of them are busy maintaining themselves and their gardens etc. without the distractions of extraneous studies.

Even face-to-face contact (in which I was usually welcomed with enthusiasm and hospitality) was not without its problems because most of the information is only available in an oral tradition. It was not unusual for members of the same community to give contradictory accounts of dates, of decisions made and reasons why particular structures were adopted - even as to what the structures were. (I think this was partly because the request to talk about legal matters often brings on a quite understandable nausea in alternative communarians).

Another problem was the complexity, "scattiness" and vastness of the areas of law related to the study. For example, the existence in Australia of a number of jurisdictions, each with their own distinct systems of rules, did nothing to assist my work, but the pluralism and diversity which it provides can be seen as an advantage to "those who seek an alternative". As a consequence also of the magnitude which any full legal discussion would have, the technicalities of law have been deleted.

Perhaps the greatest difficulty was in limiting the size of the final work, and this required a ruthless cutting down of material to be included. In particular I made an early decision to delete from the study, the following -

1. how land might be acquired in the first place - whether by Crown Grant, private treaty, adverse possession etc., and
2. a consideration of personal property, i.e. goods and chattels, i.e. property other than land and fixtures.

On the other hand, I also decided that on no account would I leave out a reference to Australian aboriginal communities. Australia has for too long left out her (sic!) Aborigines because of limited time and space. We can make room for them by cutting down on the White Man's Burden!

The field work was not done in a way which is central to the study, such as would have been the case were it a sociological enquiry. It is possible to discuss legal issues arising out of hypothetical situations. I could, therefore, have proceeded on the basis of supposition with little or no contact with actual situations. However, there are two reasons why this would not have been appropriate:

1. the study is not solely, nor even primarily, a legal investigation
2. the nature of environmental studies is such that its application to the real world is essential.

At the personal level, I wished to make some contribution to the solving of existing problems rather than simply speculating about things unseen. Hence, although this is not a case study, nevertheless, the visits made to various groups and the discussions with numerous persons (in Tasmania and other States) who are involved in the problems studied have helped me to keep word and thought in touch with real problems. In general I have been heartened by the considerable encouragement which I have received from the two sources most in contact with the issues, namely, alternative communitarians and their legal advisors.

Many of the points which I make are perhaps obvious and might seem trivial. However, it is surprising how often the most obvious and central factors are ignored in the concern with more esoteric details. In my experience talking to groups, I have ceased to be surprised at the lack of awareness that community, like life, is a dynamic process. The holding of land and the provision of "permanent" fixtures is fairly long-term and relatively static. Buildings are not radically altered on a daily or weekly basis. On the other hand, life goes on and effects its changes in people and their relationships. I have come to regard it as normal that alternative lifestyles will think me a pessimist or cynic (or something worse) if I draw attention to the natural facts of life, such as accidents, sickness, old age, pregnancy, death, childbirth, infancy and incapacitation; and to the social facts of life, such as marriage, divorce, the formation of new alliances, bankruptcy and conversion to other ideologies.

With all its defects, the law does confront us with its centuries-old and hard-headed experience of life. This can have advantages to those for whom this work has been written. On the other hand I am certainly not committed to the view that the law, as it stands at present, provides ideal solutions to our problems.

There are some specific editorial matters on which I should comment.

1. The analytical table of contents has been provided as a grand map of the work to enable the reader to see its skeleton and the line by which the study proceeds. By constant reference to it, a reader should be able to see where we are, where we have come from and where we are going. The numerals of the subject-headings have been used solely for the purpose of tying the text to the analytical table and should not be taken as breaking the flow of the discussion into discrete areas.
2. Other works referred to are given short citations in footnotes: for full citations the reader is directed to the bibliography. The short citation is given as follows: for books - the author's name; for articles - the author's name and the name of the journal; for statutes - the short title; for cases - the case name only.
3. Finally I would like to acknowledge the assistance of an "innumerable host of people" mentioned at the end of the bibliography. In particular I acknowledge the considerable

helpfulness of Robin Tapper of the Law School, University of W.A., who, as my supervisor in Perth encouraged me with expressions of warm cheer and kept up my strength with drinks of cold water. I am also especially indebted to Michael Roe of the Department of History University of Tasmania for his comments on my original draft of the section on Aboriginal and monastic communities. It will be understood in the normal way that these acknowledgements do not amount to a disclaimer of personal responsibility.

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ABSTRACT

Many people in the Western world are seeking an alternative lifestyle with others of the same mind in an environment more satisfying to their social and biological needs. Although much has been written on the socio-economic basis of such intentional communities and the history of attempted alternative lifestyles and commutarian experiments, very little investigation has been undertaken as to the various specifically legal and related political and jurisprudential problems faced by people who choose to live in community with each other. This thesis is an applied study which attempts to set some of the aspects of structuring the property holding in the context of the social desires of groups and individuals and the political realities of the wider society in which they exist; account is therefore taken of some of the environmental implications.

Land is important, and its "subdivision" is considered. The problem of common land is discussed. More radical questions thrown up by the land holding difficulties of Australian aboriginal communities are seen as a background to alternative communal land holding and use generally. These difficulties include the fact of ownership, the holding of land from the Crown, the owner's free alienability of property, and the difficulties of collective ownership.

The need to separate the property holding arrangement from the form of "business organisation" adopted by a community is put forward. Various forms of property holding and structures of business organisation are presented and some of their features (advantages and disadvantages) are discussed.

1. INTRODUCTION

1.1 The Topic Defined

The subject of, "property ownership in the alternative environment of intentional communities," is a vast one. This study will only touch on some of its many aspects. Even the task of articulating in words the area to be covered is not free of difficulties. Whatever form of words were used there would no doubt be a certain amount of ambiguity. For example, the term "property ownership" is in some ways too broad but at the same time, too narrow, to convey exactly what is wanted. In that it might suggest that I will discuss every aspect of ownership of all forms of property, it is obviously too broad. On the other hand, there is no intention to set down a narrow perspective on legal ownership of property, whilst ignoring the critical factors of how such property is used and administered in the ongoing life of the community and how it acts as a limitation on the autonomy of the community. The scope of discussion on these areas will become more apparent as we proceed, but some of the other words in the topic require clarification at the outset.

1.1.1. Community

This is a central concept in the study and one on which a copious literature has been written elsewhere.⁽¹⁾ "Hillery examined ninety four definitions of community appearing in the social science literature in the first half of this century and the only absolute consensus he found was that community involved people."⁽²⁾ In many ways it is easier to say what community is not than to say what it is and one of the things that I want to say that it is not, is simply a number of people living

1. See Dalton and Dalton

2. Ibid p 1.

on the same territory. They must be living together in a way which gives their group a separate ongoing identity. Hence, although their joint endeavour might include the acquisition and holding of property, of itself that will not be sufficient - it is ancilliary to their fundamental purpose.

The communities with which I am primarily concerned are those where there is some integration of members at the day to day domestic level. That is, a group is not a community unless it either has or proposes to have a residential dimension as one of its central aims. In addition, it is likely to have a shared economic base of some kind.

It is the types of community and their possible structure that must concern the law, for this reason exact sociological data on particular communities is not necessary. I have identified three "community" types. Although it would be more accurate to say that these are not categories or types of "community" but rather a typology of activities approaches and attitudes present within them, they can be used loosely to describe different groups for the purpose of this study. The descriptive clarification is one which should be applied by considering the emphasis which is placed by the group on various things.

1.1.1.1. Collective type

The collective is essentially an economic sharing unit, although it might give rise to domestic and social interaction as a consequence of the economic bonds. Many so-called "communities" are really collectives in that the basis of their foundation and continued existence is little more than the advantages which are gained by bulk buying and a committed market. This is not to suggest that there is anything less than the best about collectives - but merely that it is usually best for people to be

aware of what they are doing. Food cooperatives which work on a voluntary basis in a fairly informal way are examples of collective arrangements. In fact the collective is most like a business. The property acquisition and use is not simply a means to an end, it is central. Where a group of people come together to acquire land which none of them could afford as individuals, the result is no more than a collective (although something else which could be called "a community" might come of it). Bulk buying of land is not necessarily differently motivated than bulk buying food although its consumption usually takes longer. In addition there is the element of locality which is provided by land. If it is worked on over a period by people in common, the bonds of community are likely to form.

1.1.1.2. Communal type

Where a number of people come together in an alternative lifestyle on the basis of their friendship - in order to get to know each other better and discover some of the deeper facets of interpersonal relationships and in the process, raise their children in a warmer and richer environment, the result will probably be a communal type arrangement.

Here the benefit is primarily conceived of as being for the present members and their dependants ("for us now"), but they are involved in more than an economic sharing arrangement - but it is essentially sharing in community for the benefit of those who comprise it. In many ways this most closely approximates the general idea of a commune as somewhat equivalent to the nuclear family for domestic purposes but having a wider circle of persons involved. The acquisition and use of property by the group is a means to an end - but the ends are those of the individual members and not those of the group.

1.1.1.3. Collegiate type

This is outward-looking to the extent that their endeavours are not exclusively directed to the betterment of the present members. For this reason prospective members, future generations and even other species of life can be accorded a place in the frame of things. The property is regarded as being held under a stewardship and present members (colleagues) are regarded as joint managers not simply for themselves as persons but of the ongoing purposes of the whole. In many ways they are the most democratic in decision-making and egalitarian in admission of new members. Another characteristic is that they usually act through a "head of the house", but although such head has a special role in carrying out the will of the "house", there is no power of decision-making which is not presumed to arise from the consent of the majority of members in meeting. The advantage of acting through a single person - at least in dealings with the outside world, is that it coordinates information and effort, and allows the dealings to be rationalised.

Many of the religious communities have been of this type. The group ends are more important than the individual ends, but that is by choice of the individuals whose needs are thus better served.

1.1.2. Intentional

The use of this word to qualify "community" is in line with American practice. It suggests that the community exists by personal choice of the members and it places these communities away from the Gemeinschaft idea and closer to the Gesellschaft notion of association with a lesser degree of natural (moral) integration in the group. In addition to the aspect of personal choice by members, intentionality gives rise to group autonomy. An important feature of the autonomy of any intentional

community is expressed at its boundary in its policy or rules concerning membership - as to who will be admitted and who can be expelled. These are matters of legal implication.

Margaret Stacey discusses ⁽¹⁾ Konig's definition of "community" (the framework within which the human being is first introduced to social relations beyond the confines of the family') and suggests:

"This is so vague as to be nonsense: there is no such thing as 'community' which does this, at least not in complex societies." ⁽²⁾

Her view is that:

"It is doubtful whether the concept of 'community' refers to a useful Abstraction. Certainly confusion continues to reign over the uses of the term community..." ⁽³⁾

Despite what she says about Konig's definition, its reference to the socialisation of the young brings to the forefront a particular problem faced by intentional communities. Insofar as they are intentional their members have individually and personally chosen to be part of their body. Yet on the other hand, if the criteria by which the very existence of community is to be tested entail the presence of infants as non-choosing members of the community the idea of intentionality breaks down.

The significance of this is that the basic nature of any such communities must be judged according to what happens to the second generation population. The second and later generations who are brought up in the alternative community, do not have the opportunity to choose it in the intentional context of the ancestor-founders. For these later generations the community in which they have lived and been reared

1. Bell & Newby pp 13-26

2. Ibid

3. Ibid

cannot be a chosen alternative in the same way as it was for the founders. This may explain, at least in part, why so few of such alternative and intentional communities carry on beyond the lives of the first generation, and why those which do so, on the whole remain permanently parasitic for member-recruits on the wider society (eg. monasteries). However it also explains some of the difficulties which arise in creating a legal structure which is meant to satisfy the needs of a community in the long-term ie. at its commencement as an intentional community which then proceeds to include members by birth.

1.1.3. Alternative environment

The word "environment" is a problem word. It refers in each instance to something whose parameters cannot be known until the subject of investigation is known. The environment of something is its context - ie. all those things which are relevant to it and impinge upon it. In this study the subject of investigation is such that its environment is both vast and complex. It consists of the relevant human factors and natural factors which impinge on intentional communities and which are external to them.

In addition to the environment of any particular community, there is the environment which it offers to and creates for its members to live in. This could be called its "internal environment". The intentionality which exists in relation to these communities is to create such an environment which is "alternative" to that offered by the wider society. The intentionality of members can be part of the environment of the community in this sense.

I devote a full section of the study to discuss some of the environmental implications of alternative lifestyles.

2

ENVIRONMENTAL IMPLICATIONS

2.1

The problem as perceived

A number of factors have come together in most Western industrialised nations to bring about a contemporary questioning of many basic values and accepted ways of living.

These include:

- (a) awareness of personal alienation;
- (b) disillusionment with technological "progress" and with welfare assessed in materialistic terms;
- (c) awareness of the smallness of the planet expressed in terms such as, "spaceship earth";
- (d) demand for responsibility in the use of the planet's resources, including a consideration of future generations and other species of life;
- (e) adverse consequences resulting from environmental degradation: ill health, discomfort, evacuation, unsightly surroundings, economic loss;
- (f) a sense of helplessness and insecurity in individuals confronted with widespread or mammoth problems: distant and insensitive government, manipulation by mass media and by Big business, strikes, energy crises, inflation, violence, pollution, unemployment and the endless threat of war, etc.;
- (g) loss of faith in established religious views;
- (h) absence of a sense of community with others, coupled with a sense that this defect is not inevitable.

To admit all of these factors as having some consequences in Western societies is not to suggest that they are universally applicable nor that they apply to the majority of individuals in any particular place.

Doxiadis ⁽¹⁾ speaks of a crisis and lists five causes:

- (a) unprecedented increase in population;
- (b) tremendous rate of urbanisation;
- (c) huge increase in average per capita income;
- (d) unexpected, unforeseen and non-systematic technological progress, and
- (e) social and political impact that these forces have had on the life of Man.

On the political ideological front the two mainstream views of economic activity (ie. Capitalism and Marxism) have come under challenge. This has been in part because those views have in common a materialistic base and an unshakable belief in the inevitable progress of humankind by means of rational technology. The difference is seen to be one arising in the finer details as to how that progress can be accelerated. There is no difference in the domination and exploitation of the environment, and as against these views people have searched for what they see as a saner alternative. ⁽²⁾

2.2 Orthodox methods of solution

In general the solutions to environmental problems which are implemented by the wider society are piecemeal, cosmetic holding-operations. There is no general and broad approach adopted, which is based on long term ecological sanity and therefore, survival. A program to "keep Australia beautiful" is more concerned with the hiding away of the enormous quantities of litter and waste, than with confronting the real issues such as, resource use, packaging and energy consumption. "Technology" proceeds to invent commercially profitable solutions which are sometimes not even biologically viable, let alone aesthetically sensible or socially desirable.

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1. Ekistics: pref.
 2. See: Schumacher
Harper & Boyle pp 6-9
Fromm

Unfortunately, even economic considerations are not taken into account as fully as they might be. In some cases the application of long-term economic considerations would lead to decisions which are at least rational in one dimension.

The biosphere, which supports all human life is treated with indifference and contempt. The caution and restraint which should flavour every move which might result in large-scale change in the environment is met with grudging concessions made to "environmentalists", "conservationists" etc. The concessions are sometimes little more than "holding the field" for the time being, ie a proposed environmental degradation will not take place - at least not yet. The attitude of rejection which often meets those who care about future generations, about long-term national interest, about the stupid waste and unnecessary destruction going on all around them, heightens their awareness that orthodox solutions are at best palliative, cosmetic and piecemeal.

2.3 A new solution

It is as against the background of the problems mentioned and in the context of a disenchantment with orthodox solutions that there has been a renewed interest in intentional communities. This interest has in part been philosophical and in part, practical. For many people, such communities do not express a rejection of Western civilisation, but are an opportunity for individuals to do something about their own lives by cooperating with others in building the sort of lifestyle they want. From that perspective, intentional communities represent a revival of the best of the Western tradition - its encouragement of diversity, pluralism and freedom of choice.

Those who opt for an alternative lifestyle appear to be of two kinds:

- (a) those interested in simply surviving
- (b) those interested in changing society, whether by reform or revolution.

It is the second category which comprises those who are more likely to form groups, whereas the desire to simply survive (and to survive simply) allows for a more individualistic approach, even to the extent of becoming a hermit. However, the hope that intentional communities will be the means of a massive change in society (like beacons giving out the pure light of a new and better way which the masses will eagerly seek to follow) is not as common in contemporary times as it was in the last century. (1) According to Cock, those alternative lifestyle seekers

"...primarily concerned about ecology were often of a reformist vein, while those concerned with injustice were of the more radical political orientation. Humanisation and the predominance of materialism were the two major areas of rejection of corporate Australia. These were closely followed by the concern with the environment, with the 'unnatural environment' and 'pollution' and the 'lack of emphasis on understanding ecology and non-support of farming'. Finally came a concern with inequality and its consequences..."(2)

Potentially, alternative lifestyle communities have much to offer in the solution of environmental problems. I will consider these possibilities under a number of headings which refer to overlapping and interrelated areas:

2.3.1 Population

At the macro level of the wider society, the increase of such communities can have desirable demographic effects, particularly in aiding decentralisation in Australia. A decentralising process only works if there are sufficient pioneers to make it possible. Alternative lifestylers are modern pioneers even where they remain in the city but re-settle old or derelict urban areas.

1. See Hayden pp 321-2.

2. p 95

At the micro level within any particular community there is a population of human beings. As pioneers they have to be able to meet a variety of challenges without the aid of many of the supports and services offered to members of the public generally. In this respect a population of resilient, healthy and inventive persons with diverse skills and the capacity to share is the ideal. As to the question of population size in a community, much could be written. The maxima and minima in this respect depend on the geographical location and on the nature of the community desired: the collective and collegiate types can probably be larger than those of the communal type. However, any community which warrants the name must allow for some social and political realities in the determination of size. These include:

- (a) in decision making - the number that can sit around a "table" or occupy the same "auditorium"
- (b) in the event of personal and interpersonal traumas - the minimum number necessary to provide an effective emotional heat-sink
- (c) in cultural life - a sufficient number to carry a reasonable diversity in background and experience - small isolated communities produce closed minds so the minima varies according to availability of other cultural inputs.
- (d) in relationships - the number of persons with whom an individual can be (i) acquainted generally (ii) in a working relationship (iii) on intimate terms.
- (e) in economic terms - the number necessary to sustain a self-supporting⁽¹⁾ production allowing for some specialisation and some "rotation" of roles, avoiding drudgery
- (f) in genetic terms - the number required for a self-sufficient breeding population is very large. (Such communities would not be intentional,

1 I use this term in preference to "self sufficiency".

unless a tacit intention is assumed from a "failure" to leave or to be expelled, in the case of the second and later generations).

2.3.2. Material resources (1)

The putting aside of the myth of the consumer society that material possessions always bring happiness, allows needs to be assessed according to more rational principles. In general communities seek to use materials which are locally grown or locally won. Many of the exotic substances of modern industrialised society which are known to be toxic (or not known not to be) are avoided. In addition, materials are often re-cycled in the system so as to cut down on the need for additional consumption and exploitation. Because production and consumption of most goods and services are located in close proximity the material inputs do not include those necessary to maintain a distribution network, so demands such as packaging and disposal of packaging are avoided.

2.3.3. Energy

In the adoption of more intensive methods of producing the necessary food, fuel and fibre and the avoidance of a distribution network after production, much energy can be saved. Many communities look to the possibility of solar power (from light, heat, wind, timber etc.) as their basic energy source and seek a technology which provides as wide an energy base as possible with as many different source-types. Along with these possibilities, communities can - audit their energy outlays as items of capital and recurrent items, - use building materials and methods to minimise inefficiency, - adopt systems which involve as few energy conversions as possible, and - recycle energy so that the

1 The resource problem in the world is that concentrated natural deposits of materials are taken and scattered thinly through the system so as to become unrecoverable - ie. from high density to low density.

"waste" or overflow from one subsystem is used in another part of the system.⁽¹⁾ The most important potential is to design an environment and lifestyle with "the sun" as the paramount consideration.

2.3.4 Ecosystems

The possibility is that people can regain their contact with biological realities and the needs of their own bodies because things are done on a small scale at the local level. Therefore pollution⁽²⁾ tends to be minor and to be suffered by those who caused it. This results in a feedback mechanism which results in human control. In most communities there is an awareness of the web of life, the food chain (sic) and the ultimate vulnerability of the species homo sapien, and hence there is less cocksure bravado in the face of nature. Quite a lot of communities implicitly recognise the claims of other living things (both as individuals and as species) in their rules eg. the banning of cats and dogs to protect native species is common.

Duggan has written:

"Most alternative community groups are concerned with environmental issues and seek to minimise their own impact on the environment in their new life style. In terms of farm design and the domestic service installation this means taking the closed system approach. Plants, animals and humans all live together in association, forming an ecological loop, simulating the natural closed cycles of energy and materials in the biosphere. The farm is seen as an integrated life support system where the waste products of each activity feed the next activity. There is minimum wastage of energy and matter (nutrients). There is minimum pollution.

The design of each individual dwelling, cluster or community will attempt to accomplish an autonomous life-support servicing unit independent of the conventional network services. (3)

1 Kanter refers to a contemporary group in New Mexico which "arranged its buildings and allocated space within its buildings so as to fit the group's theories of energy flows.." (p.43)

2 Many instances of pollution arise because we take substances or energy which in nature are scattered and at low density and bring them together in concentration.

3 Smith & Crossley p 228

This is not all just noble ideals. For example, most communities have so little spare finance that there is no chance of them owning large machinery and methods, even supposing they wished to do so.

In Australia there is a cleavage of opinion as between those whom I will call "interventionists", on the one hand, and "non-interventionists" (or preservationists) on the other. The latter desire to leave the bush totally untouched and to build between the gum trees and enjoy the sight and sound of the birds and other creatures in their immediate vicinity. This is what they understand to be meant by conservation, ecology and living with nature. If they discover that the vegetable garden doesn't thrive under and between gum trees, then it is bad luck for the vegetable garden. There is always the supermarket at the nearest town, and the fast car to get there. The desire to protect the bush is laudable but unfortunately there is rarely any assessment made of the vast acreages which have to be cleared, mined or despoiled elsewhere in order to support the materials and energy requirements of such a high consumption lifestyle. Many urban communities do not have to face this issue as they prepare their gardens by removing the odd thistle, the rusty corrugated iron and the broken beer bottles.

2.3.5. Human environment

It is in this area that the greatest potential for change and improvement exists. However, not surprisingly, most communities concentrate their efforts on more tangible and material things. This is partly because they have to meet biological and basic economic demands in order to survive as a community or as individuals. To some extent an alternative human environment is the outcome of the sharing at all levels which communities demand and make possible. The local autonomy, the participation in the political decision-making processes

and in the production of daily needs, and the control and freedom that individuals can gain in their own lives, are all major reasons why so many people choose an intentional community as their alternative lifestyle.

But there is much more to it than that. Each community builds its own cultural idiosyncracies. Even in designing and developing its physical environment the participants share in a collective history which forms part of their human environment. The decisions which are made as to how the land will be vested from a legal point of view are important business decisions which concern the human environment not only in the content of those decisions but also in the way they were made. A constitution and other legal structures are as much a product of a community as are its vegetables or buildings. As part of the human environment, although such legal forms are not paramount in importance they do have social consequences, eg. if members feel insecure about such things they might be less likely to relax and enjoy each other's company.

3 THE IMPORTANCE OF LAND

3.1 Psychological, social and economic aspects

Human beings are land-based creatures, whose primary habitat is on land. The notions of place, locale and territory are elements in the concepts of community and privacy. Land forms the economic base for most communities - it is the means of their production of food, fuel and fibres, their source of water, of building materials and of minerals. The way that any particular society uses its land becomes part of its culture and the embodiment of its ideas - in farming, gardening, architecture, town and city planning. By this means the land becomes an identification of a people, a race, a community - it puts them on

the map and they call it their "homeland". In its apparent timelessness, imovability and permanence, land forms a strong basis of the historical consciousness of the people who inhabit it. It comes to symbolise the permanence of their communities. They can immortalise themselves by making their mark, even if that means that their activities in respect of the land, gouges irrevocable scars in it or leaves it uninhabitable.

At the individual level, an aristocratic view of the land can relate it to a sense of personal identity so that Norfolk becomes an identifying feature of the Duke of Norfolk and his heirs (even to himself). This has the result of giving a long term view of its use because the conception which is held of it includes ancestors and descendants. Even today, land can be perceived as more than a means to an end, or the ends can be thought of as being wider than simply economic. It can be a sacred object to be revered or a hostile spirit to be subdued and domesticated. Or it can be the expression of unity existing in nature, or of the alienation and isolation of human beings from nature. For communities it can symbolise their sharing, their privacy and their oneness in a common end.

However land is perceived and used, it is part of the ecological substrate, and a failure to live according to that fact spells doom for any community. Abuse of the land has long-term consequences and many civilisations of the past have been swallowed up in the deserts of their own making. In addition, communities do not usually settle on, or take up land except with some idea of permanence in their relationship to it. It is common for such communities to have a desire to "perfect the land". Unfortunately in many cases they do little more than take suburbia and its ticky-tacky to the bush. That is one of the deficiencies of the "back to the land" idea as it is often

understood. (1)

There are probably some differences in attitudes towards long-term improvement of the environment as between those communities who own land outright and those whose possessory rights arise under a lease. Except in cases where the lease is for a long period (at least 25 years) there is less inclination to work on the land in a way which is for its benefit. This does not indicate any selfishness on the part of those concerned, but often arises from the sad awareness that little is gained by working land and tending plants for many years when the improvement can be undone in a few hours by the owner's bulldozer. For example, the planting of Bunya pines must anticipate a waiting period of 30-40 years before full production is gained.

3.2

The legal definition

When we consider "land" in terms of environmental implications we refer to the tangible body of the earth, the ground, the soil and its life and resources. In terms of the human environment, "land" refers to the intangible perceptions and values to which I have already alluded - aesthetics, meanings, and the opportunities it offers for human fulfillment. However, from a legal point of view, land refers to the intangible and notional estates and interests which have become the fetish of the law. Hence, the word "land" has one of two meanings according to the context in which it occurs. The land in question from a legal point of view in any particular instance, is the estate or interest

1 "...single family dwellings are generally a hindrance to communal life, that like the "big house" phase, the "little houses" must be replaced by more complex organisation of communal and private territory. ...Most groups perceive themselves as committed to flexible spaces and adaptation, but underate the inflexibility of single family housing and the importance of circulation spaces for stimulating activity."
Hayden pp 334-335

which is held by any person in land (as used in the more general sense).

By way of qualification to what I have just said, the concern of the law in setting out legal rights and liabilities as estates and interests in land is not even with "land" as used in the more general sense. This is so for two reasons:

- (a) Buildings and structures which are placed on "land" are termed "fixtures" and comprise part of the land and property of its owner. Plants and crops are usually included in this category of fixtures. When the thing is either legally or physically severed in its attachment to the land, it ceases to be treated as part of the land for legal purposes.
- (b) Subject to the limitations of various legislation, the land includes the immovable surface area, the ground below the surface and the air space above. It is therefore divisible in both vertical and horizontal strata so that in law, a piece of land is a block (or parcel) of space. This fact explains its importance - everyone has to occupy space. The law called it "real property" and regarded all other forms of property (goods and chattels) as "personal property".

In considering property ownership relevant to communities, I will concentrate on land. A system of ownership of personal property can to some extent follow that which is adopted for land, though it would have to be different in some respects. In general the problems are not as formidable, and arrangements can be more informal and unstructured for two reasons:

- (a) Objects of personal property decay, fall into obsolescence or are abandoned, and therefore exist for a much shorter time-span than land.

- (b) The legal rules and requirements concerning land ownership (and its registration) are more demanding. Land cannot be dealt with in the same way as cars and cabbages, partly because it is not movable and therefore its ownership cannot be transferred by simple delivery, and partly because the law is primarily concerned with notional estates and interests (unlike personal property).

3.3 Subdivision of land

It would be difficult to dispute that the physical subdivision of land for sale on the market as separate lots has important environmental implications. A soundly based subdivision can enhance the land in question - small holdings farmed by organic methods will leave the soil enriched. On the other hand the cutting up of viable farms into so-called "hobby farms" with absentee city owners who are interested in tax avoidance and land speculation and who run horses which ring-bark the trees etc., is an instance of environmental degradation.

However, land can be subdivided in either of two ways:

- (1) physically, by slicing up a "block of space" into a number of smaller blocks, ie by subdivision of the strata;
- (2) legally, by vesting various claims to the property in a number of separate persons, ie. by subdivision of the total bundle of legal rights and liabilities which exist in relation to a piece of land. This occurs whenever land is leased, mortgaged, vested in co-owners, or divided between legal and beneficial owners.

Although a physical subdivision of land into separate lots requires the approval of public authorities, the latter does not require any approval in most cases. Nevertheless, legal subdivisions in some cases can render land which is otherwise fertile and desirable, almost useless. The proliferation of too many coowners without any means of decision-making

and control by them can have adverse consequences for the land as well as for their social relations. This is an instance of the interconnectedness of the human environment and the natural environment. All subdivisions of land (whether by physical or legal means) have (i) a legal basis, and (ii) physical consequences. The consequence of some forms of land ownership and control can be adverse to the environmentally sound use of the land, yet little thought is given to these implications of "legal subdivision".

3.4 Internal community subdivisions

The land of any community will probably be subdivided in terms of the community's own rules, although such subdivisions would not be recognised as such by the law unless the external legal requirements have been complied with. These internal subdivisions are not for the purpose of breaking up the land into separate pieces to sell on the market etc. They are for the purpose of allowing for various different uses - both as to the type of use and as to the persons who have the benefit of the use or possession of particular portions of land. Essentially, the uses in such internal subdivisions are of two kinds:

3.4.1 Collective - these concern the land which is used for the ends of the community as a whole and may be possessed either

by plurality of persons: usually open access to all members eg. a meeting hall or communal games area, or

by an individual or small number of persons but not with access to all members eg. an office or room occupied and used exclusively by a secretary or farm manager in that role ie. ex officio.

The point with collective uses is that they are generally recognised as being for the benefit of the whole and are subject to control and alteration

by the community acting as a whole.

- 3.4.2. Private - these concern the areas of land which are used for the ends of individuals who are members of the community, and (as with collective land) these areas may be possessed either by an individual exclusively of others, eg. a private room or garden area, or by a plurality of persons but with open access to all members. Whereas 2.1 allows each of the members control over their private areas (including the right to exclude access to any others) this type of land use (2.2) by a number of people in common but for private individual ends does not allow this right. It is an instance of "the commons" and it raises difficulties of control in rationalising possible various competing uses. Some groups (usually the communal type) have all their land as "commons".

3.5. The problem of the commons

The commons consists of property which is "owned" by nobody but used by everybody - or at least, which is open for use by everybody. It is not the same as wilderness because it has been generally appropriated for individual use, whereas wilderness is common to everyone in its non-use or passive "use". "Commons" has a number of features:

- 3.5.1 The title, ownership, control etc. is not vested in any particular individual or individuals but is general to the whole community or group. This is not the same as many other areas which, although for common benefit have certain individuals charged with their management with the power to permit access to some and deny it to others and to see to the maintenance of the facility eg. churches, university campuses, recreation grounds, town halls, cemeteries, hospitals and even roads.

One of the biggest problems with the commons is the lack of any definable control mechanism. The result so often is that it is treated and used without any care because no particular individual is charged with its care, and in environmental terms no one might notice that it needs specific care until it is too late.

3.5.2 Access and use attach to membership of the particular group as one of its privileges and therefore may not be excluded. The infringement of the rights of membership involved in denial of access and private use to a member would be tantamount to a total or partial expulsion from the group. Because the privilege attaches to membership the right to use cannot be sold to the members, nor usually, to other persons. Usually as a result of custom there is a recognition of a licence or permit in any member of the class to which it applies, to use the land for their purposes, subject to their recognition that others are also similarly permitted. Therefore, facilities for which payment is made for use on each occasion are probably not to be regarded as commons. But this does not mean that the members of the group whose commons it is, are not levied (money or labour) for its upkeep. Although access and use is open to everyone, all members of the class might not use it to the same extent and some might not use it at all. This sets the stage for disputes about just contribution to upkeep when all are levied equally. If those disputes are settled on the principle that, "the user should pay", the group has lost its commons.

3.5.3 Any use is allowed which does not permanently exclude other like uses. The right of an individual to graze sheep on or collect wood from the common land is only a right not to be excluded from doing so. It is not a right to be included nor to exclude others who are members. Therefore the commons cannot be enclosed, subdivided or in any way exclusively appropriated without being destroyed. In a sense, the commons express

an embryonic form of community - embryonic because it only holds people "together" in a negative way whereas full community is positive as well as negative. The commons rests on the basis that members cannot be excluded and in that way expresses the absence of non-community, and therefore also, the potential for community to develop. In the case of many communities, the negative and individualistic form of sharing which their commons entail, is as close as they ever get to the ideal of community. They do not develop positive aspects of inclusion and commitment by individual members having rights and responsibilities in relation to the whole.

In the light of the foregoing problems coupled with the tendency of contemporary people to lead private lives directed to immediate, short-term, individual ends, it is not surprising that in active communities the commons can present an enormous challenge to a community's continuation. But if the challenge is met, there is an equally enormous gain to the members personally in their establishment of a truly alternative environment. (1)

Before closing this section on the commons, I should note that even land in the sense of its broad legal definition does not give us a wide enough concept of the commons. The air which we all breathe but which we cannot own is another instance of the commons. It can also be 'privatised' and appropriated (by means of pollution) so that it is unavailable as part of the common stock. A stream which passes through a number of riparian landholdings is also part of the commons. The law of the wider society is starting to recognise that the ugliness, noise and pollution of modern urban areas is part of the common use and experience of the inhabitants. At the global level we have the Commonwealth of Planet Earth, including the various human "systems"

1 In some intentional communities the "commons" includes all property which is not necessarily private: even clothes. (See Kanter pp 9-10)

which inhabit it. In the contemporary environment, the commons must not only include land, but also sustenance, information and freedom.

TWO ANCIENT COMMUNITIES: AUSTRALIAN
TRIBAL ABORIGINES AND MONASTERIES
(WESTERN)

Many of those who in modern times are choosing an alternative lifestyle in intentional communities seem to believe that they are the first in the world or that the phenomenon is a contemporary one without parallels in earlier times. In view of this high degree of historical ignorance there is a great deal to be gained in presenting the issue of the relationship of people to their property (particularly land) in the context of two ancient⁽¹⁾ communities which could be regarded in their own ways as alternatives to the modern corporate State.

The point of discussing these ancient alternative communities is partly to set the over-all topic within a certain context and partly to throw up some more radical questions about law, land and lifestyle. Firstly some of the mistakes which are made by those who constitute alternative lifestyle communities today could be avoided with a little more humility and enlightenment in the face of past experience of others. The lessons of history, if learnt, can help the informed to avoid the pitfalls which arise through naivety. Although this does not assure success, it does enhance the prospect of success. Yet another reason for considering these two "communities", is that although their origins are ancient, they have subsisted to the present time and are confronted with some of the same problems in relation to legal property structures as modern communities. The problems of aborigines who seek to maintain their traditional lifestyle in the face of lack of control of land to which that lifestyle is wedded, has received a good deal of public attention over the past decade. This is not to say that there has been a solution to the problems which are not solely, nor probably even primarily, legal in their nature. Finally, these two "communities" can be placed for the purposes of my discussion as instances at the

1. I realise that the word "ancient" is used with a different time-scale in each case.

extremes of a spectrum of community types ranging from "natural" to "intentional" in their nature. Other alternative communities fall between these two poles. Hence for the purpose of comparison and contrast within that spectrum, the discussion of tribal aboriginal communities and monastic communities has considerable value in relation to their perception and ownership of land.

At the outset a disclaimer is necessary to make it clear what I am not doing. This section is not a digression into history, anthropology or sociology for their own sakes. There are many people who are far more qualified to speak on such matters and there are many authoritative words which have been written within those areas on the present objects of discussion. The underlying idea of this part of the thesis is to give the central questions a background as against which they can be discussed. Hence a number of liberties will be taken which would probably not be permitted if the work was primarily historical or anthropological scholarship. The main such liberty is that I will assume for the purposes of discussion that aboriginal life and relationship to land was the same throughout the whole of the Australian continent and Tasmania, and that monasteries were more-or-less interchangeable and do not vary from one to the other - at least not in relation to land and other property. These two assumptions are false but they are necessary for brevity, and their falsity does not affect the substance of my presentation.⁽¹⁾ I realise that making such an assumption in each case will tend to idealise and even romanticise what is said.

4.1 Aborigines - relationship to land

Although aborigines did not individually or collectively own land in

1. Part of this assumption in relation to the Australian aborigines is that the organisation of their social activity was universally structured in groups which can be called "tribes". However, even the question of the word "tribe" is in issue.

the sort of way that European legal systems permitted, their relationship to the land was multi-faceted and intense. In fact, a discussion of the "perception" and relationship which aboriginal communities had to their land runs into a problem of definition, or to put it another way, there is a chicken and egg question involved. The community could not be defined except in relation to land, which in its turn would need to be understood from the point of view of the aboriginal community.

Perhaps I should more accurately say "points of view" to convey the multi-faceted perception of land which they held and as against which our ideas are narrow and barren. Even prior to the influence of the Equity Jurisdiction of the Court of Chancery in treating land as a marketable commodity to be bought and sold freely just like any other asset, the common law feudal ideas of land were, by comparison, poor. Although feudal land notions were "attached to" family origins, personal identity and even, to a small degree, to aristocratic immortality, these notions were not as rich as their equivalents embedded in aboriginal culture and lifestyle. However, since Equity affected the course of English land law and turned it away from its feudal origins (to some extent) the connotations on the word "land" have been largely economic in nature. Hence the comparison between the tribal aboriginal ideas of land and those of modern European Australians, is very small and the contrast is greater than with feudal England.

It is, in part, the centrality and inalienability of land which reflects the aboriginal communities' "natural" flavour - it was inalienable within their communities and between their communities. Land was not an asset which could be acquired and disposed of in any transaction, whether barter or otherwise - Batman's attempt to procure a large tract from them by treaty, notwithstanding. The land simply was, and in its central place in the definition of social roles, gave a static dimension to the interrelationships within the community and to

the relationship between the aborigines and the land they had to exploit in order to live. Their "history" was almost entirely their geography.

Land was inalienable because of its social and religious centrality. The idea of alienability was not merely not present, it would have been inconceivable in terms of their lifestyle in much the same way as it would be inconceivable to us that it is possible to change one's natural mother (and probably for similar reasons.)

In its centrality, territory was the basis of identity for individual and group. The land surface was..

"...divided into discrete local territorial units... Each of these was named, had its own religious significance and was conceived as the origin place for an identifiable group of people." (1)

Each individual had religious and political claims and responsibilities to his territory of origin and to the territories of parents, grandparents and spouses. These territories could be used for economic exploitation. Within these tracts of land there were sacred areas with access restricted to those who had the protection of the appropriate religious and ritual knowledge.

"Any person had rights not only to the knowledge of his own territory but also to that of several others." (2)

Although "...the boundaries of many territories were vague" (3)

and "...did not have the tight physical boundaries and the family unity of a city state or nation state" (4)

they were to each local band

"...an essential constant that made their plan and their code of living intelligible. Particular pieces of territory, each a home-land, formed part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its coordinates." (5)

1 Biernoff p 16

2 Ibid p 18

3 Blainey p 30

4 Ibid p 29

5 Stanner 1969 pp 44-45

Hence land was the basis of their social structure and thus central to their society's continuation. It was in this very significant sense that the aborigines regarded all land as common. Particular territories were freely open to entry and exploitation by an individual, according to kinship ties. Other territories would rarely be closed provided the correct procedure was followed to secure permission to enter from those whose territory it was. But, more fundamentally, the relationship to the land and the acceptance of the beliefs about the various territories comprised a central aspect of their "commons". Indeed, this commonality is more important than, and probably supported the idea that land was "owned" and used collectively rather than individually.

We would be misled to imagine that our ideas about and associations with land come very close to those of the Aborigines. As Stanner says:

"No English words are good enough to give a sense of the links between an aboriginal group and its homeland. Our word 'home' warm and suggestive though it be, does not match the aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else all in one. Our word 'land' is too sparse and meagre..The aboriginal would speak of 'earth' and use the word in a richly symbolic way to mean his 'shoulder' or his 'side'. (1)

Their attitude to land was "religious" in the strongest possible sense.

The mythology and traditions fitted in excellently with the landscape.

It... "...did not concern itself with the sky, but with the earth; and all the human beings living in this land were believed to be linked indivisibly, by means of 'totemic' ties, to the supernatural creators, who were still slumbering in their midst at sacred centres dotted throughout the eternal landscape." (2)

This religious view of land had enormous effects on their lifestyle.

For example, the boundaries between different areas were

1 1969 p 44.

2 Strehlow p 95

"...demarcated by episodes in the sacred myths and were therefore not subject to revision. This provision prevented the raising of boundary disputes by neighbouring groups; their geographical borders had been fixed by their own supernatural beings." (1)

To them the structure of the world and life was fixed once for all at a remote time in the past. Their myths depicted the structuring of the past as a set of dramas and the countryside was filled with

"...plain evidences that the dramas had occurred... The forces expressed in the dramas were thought to be...dynamically available for men to use. The whole environment though charged with numinous import, was still a ground of confidence since it had been continuously occupied by their own people." (2)

Stanner claims that aboriginal rites were fundamental attempts to make social life correlative with the plan and rhythm of the cosmos.

On the basis of the deeply religious relationship which aboriginals had to their land, the Europeans use of land and their generally not living in harmony with the environment and being intimately part of it... "...was seen...as both illegitimate and sacrilegious. It ignored the balance of nature, and the supernatural order of existence." (3)

In addition and on a more pragmatic level, the European use of land and their denial of access by aboriginals to water and other natural resources destroyed or exiled their communities. Stanner (4) describes this situation as one of "homelessness" bringing on "vertigo", or a kind of "spinning nausea into which they were flung by a world which seemed to have gone off its bearings." (5) Unlike the Europeans, they held the view of the world in which humankind is integrated with nature and not sharply distinct or differing in quality from other species. All natural living things were perceived as sharing the same life essence.

1 Ibid p 98

2 Stanner 1963 p 254

3 Biernoff p 23

4 Stanner 1969 p 44

5 Ibid p 45

This attitude was the basis of their social interrelationships, and to the way they lived in harmony with their environment and treated their land as a supportive friend. Blainey (1975) claims that "The average Australian, adult and child, knew more about botany one thousand years ago than they know today." (1)

But perhaps to call this knowledge "botanical" is to see it through Western eyes. In some sense, we might almost call this knowledge "theological" and be a little closer to the truth - although it was not theology in the Western tradition of a God up in the sky who was removed from the daily affairs of nature and life. For them there was no separation of purported religious views from actual lifestyle. Their religion was their lifestyle and their lifestyle was their religion and both were intimately connected to the land.

"The land itself was their chapel, and their shrines were hills and creeks and their religious relics were animals, plants and birds." (2)

I have tried to work out a parallel which could be used as a metaphorical explanation of the "religious" importance of land to aboriginal communities. To suggest that the destruction of cathedrals and relics of Christendom would be a parallel is to miss the central point. Those things, however significant they may be, were originally built by human hands - in most cases they could be rebuilt. Undoubtedly, any such rebuilding could not restore the antique value which the originals had, but that is more a general cultural and historical loss than a specifically religious one. The gospel is believed to be just as efficacious and the sacraments not less valid in a modern red-brick ecclesiastical building as in any ancient edifice, albeit that it suffers from the loss of a certain mystery in the evidence of a tradition from

1 Blainey 1975 p 171

2 Ibid p 202

"way back".

The closest analogy that I could devise, is for us to imagine that Christendom were to hand over the sole copy of its holy scriptures to a bunch of insensitive pagans who would proceed to rewrite the books of the Bible in such a way that the point made in those stories would be totally and irreversibly altered. Perhaps to convey the sense of confusion and horror at some of the farming and mining activities of the Europeans, the analogy should have the pagans using some of the sacred pages as toilet paper in a way which first erases the message and then flushes it away for all time. It is impossible to accurately portray what was done to aboriginal culture by the interruption and destruction of their relationship to their land. It is the European settlers who have acted as the insensitive pagans in claiming that aboriginals did not have a religion which was set down in writing. In fact the aboriginals read their "religion" in their environment and looked to the sacred lands as the place where "It is written."

4.2

A modern contrast

One of the surprising things about many of the people who may be said to be part of the alternative life-style "movement" is their apparent enthusiasm in embracing eastern religions. For some of these people, no doubt the choice is personally satisfying, and for almost all of them the institutionalised Western religious views, do not satisfy. But it is surprising (at least to me) that so few have looked seriously at the ideas of Australian aboriginal communities as a source of guidance in matters such as the relationship to the environment. Perhaps it is partly a desire for the more distant and exotic, and the tendency of people to be unsatisfied with things which are as close to home as one's own backyard. Whatever is the cause of this lack of interest, those Aboriginal communities form models from which important lessons can be

learnt and applied to all modern alternative lifestyle communities in Australia. In the words of Biernoff

"It is interesting to postulate that Aboriginal Australian cultures are unique and sufficiently independent to constitute truly alternative life-styles to those found elsewhere." (1)

Much more would be possible to obtain food, fuel and fibre using productive plants and animals indigenous to this Continent if the ancient insights and skills of the aborigines had not been lost (or liquidated). The way in which the aborigines maintained their means of production (the land) over thousands of years, where Europeans have turned huge tracts to desert in just two hundred years, is worthy of note. This is not to say that the aborigines did not also destroy their land and extinguish some of its life-forms - particularly by means of fire. But a consideration of their respective histories in this Continent leads one to reconsider the question of who was the more "civilised", advanced and rational in the long-term building of a community and its economic support.

4.3 Non-intentional natural

Perhaps the main respect in which modern communities cannot hope to duplicate those of the Australian Aborigines is in the very fact that they are consciously and deliberately set up, whereas the tribal communities are not consciously established or chosen by those who comprise them: they simply exist in a take-it-for-granted way. This take-it-for-granted attitude reflects their "natural" dimension and contrasts with the chosen-for-the-time-being attitude which prevails in most alternative communities of today reflecting their more intentional character. From the point of view of the Australian aboriginal communities, it could only have been the white settler whose lifestyle was "alternative" - and a very undesirable alternative at that.

4.4

Monasteries: comparison and contrast

However, centuries before the white colonisation of Australia began, European society had confronted and been confronted by other alternative communities, viz. monasteries. As communities these were different from those of the Australian aborigines in a number of respects and somewhat similar in other respects. They were not "total" communities in that they did not breed their own future generations, and they did not exist except as alternatives alongside (or perhaps more accurately) as against, the wider society. Hence many of the functions and roles which must necessarily exist in any "total" community in order for it to survive, were not present in the monasteries.

To take a monastery as a model for setting up a modern alternative community is to choose a model which is very useful for some purposes, but defective for others. Indeed the alterations which must be made, (eg. the removal of the requirement of celibacy and the provisions for the needs of children as the next generation) are more substantial than a change from nomadic to settled lifestyle. Monasteries were able to "parasitise" on the wider society by recruitment of novices to comprise the following generation required for the ongoing life of the community. But although a monastery is not a completely self-contained community (in that they lacked the means of biological perpetuation) they did practise a strong commitment to the unity of lifestyle and religion.

It follows from this, that the total population of the monastery was there by reason of a choice having been made at some time in the past. In fact there were two "choices" of significance to every individual - firstly the choice to establish the monastery (which was made by its founders) and, secondly, the choice of that individual to join and of the house to accept him as a member of the monastic community. In no case was it possible for this second choice to be

abrogated by the mere fact of birth, because birth never gave passage into monastic life. These matters are all in sharp contrast to the position which prevailed among the Australian aboriginal communities and it is for these reasons that monasteries can be put forward as association rather than community in the total biological sense, ie. as instances nearer to the intentional than the "natural" end of the range. On the one hand we have conscious choices as the factors deciding the existence of the community and the composition of its membership, and on the other we have the natural factors of birth and kinship ties. I recognise that this is a limited application of the terms "biological" and "community", because in other ways monasteries have been rightly regarded as communities in the full sense.

There were certain demographic similarities between these two ancient community types. They both had a high degree of decentralisation in "establishing" groups which remained in contact with one another, either as a tribe or as an order. Where a particular house within a monastic order grew too large, some of its members would hive off to establish another community elsewhere. For the purpose of establishing any such new monastery, the site for its buildings would be chosen to meet certain criteria. The land beyond, which was not part of the monastery was not regarded as being of any real interest to the community - it was certainly not a subject of religious values and meaning. Neither did the land of the monastery carry any religious attachments as did the tribal land of the aborigines. To the monks, the land was not imbued with special significance as the place of their natural births, and because it had been chosen it could always be unchosen. Their idea of God was of a transcendent Being, and they would reject the view of land - which the aborigines held, as pantheistic, and even idolatrous. To them, the land of the monastery was not a religious object as such, although it was the arena for religious vocation. This view allowed

for the more fluid "demographic" circumstances of monastic life. However although there could not have been an "aristocratic" appreciation of land in the context of a natural family, this no doubt existed in relation to the monastery as a family. Certainly in the case of both of these ancient communities there was no individual ownership of land; it was held in common and used for collective purposes. But for the additional obvious reasons, natural inheritance did not exist in monastic communities. In addition, demographic factors arising out of a settled, rather than a nomadic lifestyle, made possible the accumulation of vast quantities of wealth and possessions for which the monasteries later became famous.

As an application of the Western-Christian views, the monasteries regarded themselves as stewards of the land, but stewards or custodians of a special kind in that they regarded it as having been delivered into their hands to exercise dominion over it. They accepted (and preached) the us-everything else dichotomy of the surrounding society. To them there was Man and there was his environment, and although they must be in contact, they were of a different substance and the former was charged with pacifying, dominating and exploiting the latter. This view contrasts with that of the Australian tribal communities where there was probably no concept equivalent to what we understand by word "environment"; where the man-environment dichotomy does not exist and would probably be regarded as nonsensical.

The "biological" - intentional contrast can also be seen in relation to the questions of expulsion and resignation of a member from a community. These are both matters which affect the rights and liabilities in respect of property. Expulsion from the aboriginal community took place by means of death imposed either by direct physical means or psycho-socially. In the case of monasteries, expulsion was never carried out by means of death - at least not officially.

A person who had joined by a choice could be removed by a choice because there was somewhere else for him to go. Monasteries existed as one of the possible alternatives within a larger society, whereas for the aborigines, tribal life comprised the only society which was existent and conceivable. Hence voluntary resignation was hardly an option. However it would be wrong to imagine that resignation was a course which a dissatisfied monk could take with ease. It is true to say that the initial decision to join was a matter of choice, but that would have given rise to a life-long commitment analogous to marriage. Although there may have been no legal barrier to a voluntary withdrawal (at least not imposed by the secular authority) any such person would be constrained by hard economic realities at the thought of their leaving without any material means of support.

Monasteries grew rich in material wealth and they were the first to revive following general calamity. This is so for a number of reasons. Sharing of resources, the division of labour, the sense of purpose, freedom from the burden of having the care and education of dependant infants, and a long-term approach to their use and exploitation of land, were among the factors which made this state of affairs possible. But in addition, the vow of poverty taken by members of the community on their admission had the effect of aggrandising its wealth. A one-way system such as this, where the material resources and the skills of each incoming member were available to the monastery without expenditure on its part and where none of that material wealth could be removed if that member were later to withdraw, amounts to a substantial capital subsidy by the wider society.

At the ideological level, modern alternative communities have many things in common with these two ancient communities. In particular, there is the strong commitment to the idea that "religion" and lifestyle

cannot be differentiated, ie. that people should live in accordance with their beliefs and that they should hold the beliefs which are real and appropriate to the sort of creatures human beings are in a finite and delicate environment. This view is fundamental although there is a great deal of difference when the details are spelt out more fully. But these differences are to be expected - indeed, they have their parallels in the two ancient communities discussed in this section. This brings me back to my disclaimer. Just as it is not correct to think that all monasteries were identical and that there was no variation in lifestyle and religious views of the Australian tribal communities, so also there is no need to think that modern communities should necessarily all conform to a standard World view or alternative lifestyle. Given the fundamental commitment mentioned above, diversity in the solving of practical problems should be regarded as a strength and a virtue: it is part of being human. At the level of the small band or the house there is not much room for diversity of approach. These become more appropriate at the level of the tribe or the order, and even more possible as between different tribes or orders.

With their commitment to the unity of religion and lifestyle, monasteries have maintained a certain rational ordering of their affairs. They could therefore reject the greed, sham and hypocrisy of the wider society around them and build a community based on brotherly sharing and mutual aid. It was by reason of this disciplined rationality together with their alternative nature, that they survived through the Dark Ages and "carried" western ideas and cultural treasures with them. They were (comparative to the wider society at the time) islands of enlightenment. Modern alternative communities are often regarded in the same way as against a wider society which is seen as irrational from an environmental point of view and hypocritical from a social point of

view. It may be that they will "play a role" in the future which is somewhat similar to that played by monasteries for Western civilisation through the Dark Ages. Any intolerance by the wider society to them, or use of repressive laws and bureaucratic harassment, is therefore often taken by alternative communarians as a sign of the extent to which Western civilisation is at present once again living in a new dark age. Coupled to this direct experience of the modern centralised, corporate State, is a belief in its carelessness concerning the health and well-being of its citizens, its distance from their control and its mindless religion of economic growth regardless of consequent human horrors, environmental degradation and even threats to the survival of human and other life. There is a need for alternative lifestyles to maintain a flickering candle of sanity and an awareness that there are certain moral and biological limitations to what the Great God 'Man' can do, despite his enormous economic knowledge and nearly-infinite engineering prowess and technological capabilities (so he thinks). It is in the arena of human relationships and social institutions that the pathetic bankruptcy of Western "civilisation" is most clearly seen.

4.5

The spectrum of alternatives

These ancient communities both represent lifestyles which are in various ways "alternative". Furthermore they can be placed at the extremes on a spectrum or range of modern alternative community types, which, in turn, can be compared to and contrasted with them. On the matter of the voluntary choice to join or leave and the existence of modern communities as an alternative within a wider society (the intentional aspect) the comparison is with the monasteries. In their having to confront the facts of birth and the presence of dependant-infants, (the biological aspect) the comparison is with the aboriginal communities. There are other comparisons, and at least one major one will now

occupy the discussion for the remainder of the section. Put simply, it is that they have both confronted a threat to their existence through an attack on their capacity to have and to hold land. It is probably true that in both cases the attack was motivated by greed, and carefully screened by the doctrines of law which were current at the time.

4.6 Land holding threatened

To this point I have used the word "ancient" partly to express the historical truth that every modern alternative community is by comparison a Johnny-come-lately (as is all white settlement in Australia). However, it would be incorrect for there to be any implication that these ancient communities no longer exist. Although not modern in their origins, they are contemporary in their existence and their alternative lifestyle. Therefore the time has come for me to cease to use the past tense in reference to them, particularly of Australian aboriginal traditional communities which exist today to confront the most urgent need for their continuation - ie. the control of their land, including the exclusion of any use which is incompatible with their lifestyle.

4.6.1 Threat to monasteries

The difficulties which the monasteries faced when threatened with the seizure of their lands and possessions by Henry VIII, is available for reading in many works on English history. Although the plundering of the monasteries is something which happened in the past, we would be misguided to believe that nothing could be learnt from it which is applicable to the present time. There are lessons about the "psychology" of centralised political authorities which contemporary communities would do well to understand.

However, the point most directly relevant to the thesis is that the legal device of the trust was developed at that time for the very purpose of protecting the monasteries from the threat which they faced. It was by means of the vesting of their property in some legally suitable person outside the monastery to hold for the use and benefit of the monastery that the monastic property was able to be hidden from the King's greedy gaze. The trust is now an appropriate device which can be used in some instances to structure the property-holding of present-day alternative communities. In addition to its direct usefulness, the trust is one of the legal ancestors of the modern separate corporate personality. That notion can also be useful in designing a structure to suit the particular needs of different communities. Certainly trusts and corporate bodies are among the various alternative legal forms which should be considered.

4.6.2. Threat to Aboriginal communities

By considering the Aboriginal land rights issue it is possible to see more clearly the difficulties which alternative communities of almost every kind face in structuring their property ownership within the present legal system. It also throws light on the paradoxical situation in which some of the more radical of such communities find themselves in dealing with the property ownership question. Furthermore, devising solutions to the problem with respect to Aboriginal communities could provide structures of communal or collective ownership of land which are also suitable for some modern non-Aboriginal alternative communities.

To the traditional tribal Aboriginal communities,

- "land" is (i) RELIGIOUS: the evidence of the common origins of the people, of the dramas of the Dreaming, of their faith;
- (ii) SOCIAL: the expression of the code of social inter-

relationships - between individuals and groups;

- (iii) ECONOMIC: the means of livelihood and sustenance in a land-based, but nomadic lifestyle.

That view of land was brought into collision with a radically different conception where the economic aspect had such importance as to virtually eclipse any other considerations. To make matters much worse, the understanding of economic interests was very limited, its time span generally did not extend beyond the life-time of persons living. Confrontation with the British legal system and its view of land as little more than a marketable asset commenced for Aboriginal communities in 1788. British land law is based on the "dramas of Hastings" in a dreamtime which, according to the white man occurred in or around a year identified by the number "1066". As a consequence of that "dreamtime" all land in Australia and everywhere else that white man held up a piece of cloth (known to them as a "flag") was said to be vested in the Crown of England, Scotland, Wales, etc.

4.6.2.1 Paradox of holding land from the Crown

Discussion of the Aboriginal land rights question which proceeds as though the granting of land title to the Aborigines provides a total solution, misses the point that it is almost a contradiction in terms for Aboriginal Communities to have title to their traditional lands vested in them by the British Crown. This is the most extreme case of the paradox which can arise when alternative communities own property within the "non-alternative" legal system. The extent of the paradox is determined by the degree to which the community in question is alternative. In the case of the Aboriginal tribal communities, even the attitude towards land itself is "alternative" to European-Australian society.

In addition to this philosophical paradox there is the legal possibility which it throws up of resumption or compulsory acquisition of land to the Crown by governments at any time if the estate which is held is the fee simple (the greatest order of estate which anyone can hold from the Crown under British land law). This is a practical difficulty which stands in the way of any ideal solution without legislative intervention. Alongside this difficulty should be placed the possibility of over-riding legislative powers (such as those contained in most mining statutes) and the revenue raising of government through land rates and taxes.

The Aborigines had their own system of land occupancy and a fairly lengthy quote from Stanner is appropriate to spell out that context:

"All land in Australia is held in consequence of an assumption so large, grand and remote from actuality that it had best be called royal, which is exactly what it was. The continent at occupation was held to be disposable because it was assumed to be 'waste and desert'. The truth was that identifiable aboriginal groups held identifiable parcels of land by unbroken occupancy from a time beyond which, quite literally, 'the memory of man runneth not to the contrary'. The titles which they claimed were conceded by all their fellows. There are still some parts of Australia, including some of the regions within which development is planned or actually taking place, in which living aborigines occupy and use lands that have never been 'waste and desert' and to which their titles could be demonstrated, in my opinion beyond cavil, to a court of fact if there were such a court. In such areas if the Crown title were paraded by, and if the aborigines understood what was happening, every child would say, like the child in the fairy-tale, 'but the Emperor is naked'". (1)

Schebeck has referred to "...sacred objects that are title deeds to the land", (2) but it is doubtful whether this is anything more than a very loose metaphor. It is unlikely that the Aborigines ever had anything which bore much resemblance to title deeds under English land law. This is so because a fundamental notion of English property law is that property should be freely alienable - and therefore, that fetters on its alienability should be viewed with suspicion.

1 Stanner 1969 pp 26-27

2 In Peterson p 9

The law went to great lengths to maintain the freedom to dispose of, charge or otherwise encumber land in a free land market. In such a system, the idea of title deeds has some usefulness as the means by which the present position of ownership of pieces of land has been recorded and therefore can be ascertained. On the other hand, the idea of a land market and of the free alienability of land has no place in Aboriginal culture; any more than the sale or exchange of parents, spouses or children would make sense in European culture.

The vesting of the fee simple in an Aboriginal community leaves intact the inappropriate, but central conception of land as an asset which can be bought, sold, mortgaged, etc. In an ideal situation they would hold the land under their culturally appropriate terms and this fact would simply be accorded recognition in a way analogous to recognition at international law. This would require compromise (as well) under British legal doctrines. A compromise such as this is probably unlikely in the foreseeable future.

One of the reasons for discussing these more basic questions of land rights is to point up the fact that in relation to alternative lifestyles and communities there are always other angles from which to see the established legal system. It would be a mistake to imagine that the present legal doctrines and fictions will last forever, or that there could not come a time when British law will have to make the substantial compromises, if indeed British law then still exists. To believe that the system which exists today will last till tomorrow and that it could not be otherwise, is to lapse into superstition.

The final problem which I will touch on in relation to Aboriginal land rights, is that English property law requires that property is vested in an individual or identifiable individuals. This requirement does not suit the needs of Aboriginal "ownership" which is not

individualistic but collective or communal. The land must be held by and on behalf of the whole community or class and not vested in a group of individuals. English property law prefers individual ownership and will not recognise ownership by a class of persons or by a community with a changing membership. It is at this point that we can see the relationship which exists between the structure of a community on the one hand and its ownership of land and other property, on the other.

In the case of an alternative community, its internal structure is important if it proposes to hold land because there must be some form by which title can be held under the English land law doctrines. This means that the need for a structure which is suitable for property-holding, is imposed from the system outside the community. The only way that this requirement can be avoided is for no property (including land) to be owned or occupied or used. Because this is virtually impossible, almost all communities of an alternative nature must grapple with the legal problems of their internal structure and their relationship to the outside world in respect of property ownership, occupancy and use. The right to use, possess and control land is fundamental to self-determination in choice of lifestyle, and in most communities, to the building of "group identity".

Various compromise solutions to the problems raised in relation to Aboriginal land rights are possible within the present English land law doctrines. Olney suggests Aboriginal corporations, which he claims

"...will be a cross between a local government authority, business undertaking, community welfare agency and building society." (1)

He goes on to argue for the need for simplicity of establishment and management and for adequate powers including:

"to be able to own and dispose of all types of property and rights, to borrow and lend money

and to carry on business." (1)

and says:

"In endeavouring to fit the Aboriginal corporation into the existing legal structure, or in endeavouring to make new laws to provide for the establishment and operation of Aboriginal corporations it may be necessary to abandon many conventional concepts of corporation law and procedure and to establish new approaches to what are essentially new problems." (2)

Nevertheless, a substantial compromise would be needed on their part to adopt such a structure to suit the English legal doctrines. It should be remembered that the compromise required is one involving lifestyle and to some extent therefore, "religion".

Other solutions by means of legislative change, are also possible. These all amount to working within the present legal system and in some way or other vesting a land title in Aboriginal communities for their collective use and enjoyment. In other words, the more fundamental paradox of a British title being held by traditional tribal communities in Australia is left standing, and the solution is limited to deal with the ways in which the collective (or communal) ownership can be structured and protected. Plural (alternative) level solutions to this problem, if devised, should be available also for the use of non-Aboriginal alternative communities in Australia. Essentially the problems are similar at that level. The bias of the law is individualistic and therefore the difficulty is to structure the property-holding in such a way that the requirements for an on-going community life are not threatened. It is for this reason that corporate structures come readily to mind and have been suggested for or applied to many such community situations.

1 Ibid p 4

2 Ibid p 5

5 THE SEARCH FOR A STRUCTURE

5.1 General difficulties

Any group of individuals who seek to establish a land-holding intentional community, confront a number of difficulties in their search for a suitable structure.

5.1.1 The paradox of ownership

The very ownership of land in the form of holding an estate or interest which is derived from the absolute ownership claimed by the Crown, might be anathema to those who are seeking more fundamental alternatives.⁽¹⁾ Even apart from this ideological or deep-seated psychological objection (which only applies where land is involved) the idea of property ownership of any sort might be seen as undesirable in principle. Property rights of all kinds are backed and maintained by the coercive sanctions of the State. It is therefore impossible to claim ownership of anything within that system without also being "contaminated" to some extent by the notions and mode of operation of the system. For most alternative communities, this difficulty is overcome by the realisation that life is often paradoxical and that in any event, they were not given any real choice in the matter as it is the system in which they must operate which defines the manner of land holding within it. On the other hand, it is not the system which sustains biological life and presents individuals with the natural necessity to occupy space, inhabit land and seek to live from its bounty.

5.1.2 The paradox of freedom

To some people the existence of any structure or structures is contrary to the spirit of freedom which they seek by opting out of conventional lifestyles. Structure for such people is represented by impersonal bureaucracy and the interminable nit-picking of lawyers, accountants,

1 See Mumford's discussion on private property, p 129

clerks etc. who administer, control and coordinate the system of human management. It is the nature of the search for self-sufficiency that it attracts a large number of people who are least suited to coexist (let alone live) in community with others. Structure is thus often seen in the negative terms alluded to, and internal rules to establish and clarify the minimal requirements of group life are rejected in toto. In such cases it is not the content of particular rules which is rejected but rather the fact of having rules at all.

This states the position at its most extreme. The people who hold such views are unlikely to benefit from this study because apart from anything else they are not likely to be interested in reading it. However, it would be foolish to dismiss this position in a cavalier manner. The increasing regulation of and interference in the lives of people by mindless rules, structures and expansionist bureaucracies (government, semi-government and non government) is part of the environment to which an alternative is sought. Therefore, one of the criteria for assessing any proposed structure is the degree to which it can be operated by intelligent lay people without significant demands on their time and nervous energy and without an "army" of lawyers, accountants etc. giving constant advice. This is particularly so if people are simply living together and not carrying on any commercial undertaking where such professional assistance might be regarded as normal and able to be paid for from money generated by their commerce.

In general the structure chosen should be considered in the light of its over-all capacity to facilitate the freedom of the community and the freedom of the individual members. This is a question of balance. The entry into community involves the giving up of some liberty (which is most readily available to hermits) in exchange for the freedom which community makes possible.⁽¹⁾ Where a community has a large population

1 A leaf which has fallen from a tree is at liberty to go wherever the wind blows it, but the leaves which remain attached to the tree have the freedom to participate and contribute to the life of the tree although not at liberty in the same way as the loose leaf.

engaged in many diverse operations it represents a substantial long-term economic investment. It is likely that its structure will be relatively formal and complex. On the other hand, a small group of people who share the lease of an urban dwelling on a year-to-year basis will be able to maintain the cohesiveness of their operations with little formality and complexity.

5.1.3 The absence of literature

Such as has been written on the possible ways of structuring intentional communities is sparse and scant in its discussion of alternatives - particularly in the legal and property areas. (1) This is in distinction to the substantial literature available on physical structures and on related sociological data. When this neglect has been rectified, a new dimension will arise to be dealt with, namely the structuring of relations among a number of communities which wish to join together in common pursuits of some kind.

Although there is very little written to point out the legal possibilities open to structure property ownership, many books on alternative lifestyle communities either assume or state that proper legal arrangements should be made. (2) Unfortunately, any writing on an area of law can suffer from the same "deficiencies" as exist in the law itself. (Writing on legal areas involves a number of risks which are not shared in the same way by those who write within other disciplines.) I will now discuss some of these "deficiencies."

5.2 Legal difficulties

5.2.1 In Australia there are several separate jurisdictions (each State and the Commonwealth) each with its own rules of law. Even the so-called "uniform" Companies Acts are different in important respects. So each community must determine its arrangements according to the law applicable to it. This diversity is not necessarily a disadvantage because in some cases

1 See Smith & Crossley p 227

2 See Robinson p 209

it allows choices which are unavailable in some other parts of Australia. However, in the main, the diversity exists in legal technicalities and bureaucratic control rather than in important matters of substance.

5.2.2

A further problem in dealing with and in writing about the law is that it can change so quickly. The enactment of legislation can radically alter the whole kalaidoscope of legal relations overnight - even without the knowledge of those whose relations have been altered. This has consequences in the ongoing life of a community as well as in its initial establishment. (It also threatens this study with the prospect of being rendered out of date at any future time.)

5.2.3

In general, the law does not facilitate the structuring of alternative, intentional communities. If people band together for commercial purposes the law facilitates their operations by providing all manner of forms in which they can contrive their joint activity. For example, partnerships and companies of different types are available "off the shelf". The only significant structuring of domestic or residential (non commercial) joint activities which the law provides is the case of marriage and the family. This is partly a reflection on the historical basis of the law. In time there will be a greater demand for the law to provide the opportunities that are needed in this area of environmental and human good sense. It is not enough that there be no legal rules blocking the path to more sane lifestyles. The law should not merely not inhibit sanity, it should also enable and encourage sanity and inhibit insanity. There are many areas of law apart from those dealing with property ownership where the legal rules need reviewing in the light of this principle, including land use, zoning, building codes and taxation.

5.3

Property unsuitable as structure

To some extent the ownership of property by a number of persons in common provides a structure for their use of that property. On the

other hand, as I pointed out when discussing the problem of the commons (1) property rights require the forbearance by others against acting in particular ways in respect of the property, rather than the performance of particular acts. To put this another way, property excludes the doing of things by others, it does not include their doing of things. In this respect such rights are different from those arising under contract which often include the doing of things ie. involve duties requiring positive action. Because property rights are not infringed generally through mere passivity and inaction they do not form the basis of full community relations. Community entails positive acts by those who comprise it and not merely forbearance. Hence property law cannot provide a complete answer to the legal form or structure of community.

However the law places considerable emphasis on the structure of property holding, and if for no other reason than to attempt to escape from that emphasis in structuring a community, it should be confronted and understood. For example, a community might seek to avoid a "capitalist" mentality which lays great emphasis on the securing of property contributed by members but turns a blind eye to hard work, imaginative ideas, peaceful personal relations and self-discipline in keeping the community happy and prosperous. Again, it is a question of balance.

In some instances land, money and other property are invested by people who are not members of the community and proper legal arrangements need to be made to clarify their position as well as that of members and the community. Money invested in the purchase of land is usually fairly secure but it is not then available to be easily converted back into money without the sale of the whole land. This is not a problem peculiar to communities, except perhaps in its degree - money which is invested by a person in the purchase of a suburban residence is similarly

1 See Section 3.5.3

tied up as a non-liquid asset. But surprisingly, people tend to judge communities as though these sorts of difficulties are unique to that form of lifestyle.(1)

So far as a contributing member of a community is concerned, the property represents some structure in the claim to its use which is in accordance with the rights conferred by membership. Depending on the rules of the particular community, a member's rights to use the land can be very wide and almost unrestricted or very narrow and restricted. For most purposes the member will have to be satisfied with the rights as defined in the rules. In that respect the legal position parallels other similar cases: neither the member of a church or club, nor the shareholder of a company, nor the employee of a business, have a right to enter upon the premises or drive one of the cars etc. unless that right has been conferred under the rules. A breach in this respect does not amount merely to an infringement of the internal rules of the body in question but also to the commission of an act which is unlawful under the civil law and in some cases, criminal law as well.

The termination of membership affects the rights of a member as against the community and can occur by resignation, expulsion, death, or by dissolution of the group. Particularly in the early stages of a community it is common for there to be a large degree of coming-and-going of members. A system of ownership which ties membership to property rights in land, can be very cumbersome. If every time there

1 People often expect to have the best of both worlds - on the one hand they want the security of land holding through the purchasing power of collective activity but they want to be able to come and go with ease. This raises for communities, problems of individual security v. group security.

In general also the standards which are expected by members and outsiders in the personal relations within communities is usually impossibly high. No ordinary suburban nuclear family attains the perfect behaviour which is commonly required of intentional communities.

is a coming or a going it is required for everyone to sign a transfer of an interest in the land, not only is the system cumbersome, it is also expensive.

In addition to being cumbersome and expensive, such a scheme of things can undermine community autonomy, particularly if membership always follows simply as a consequence of the holding of a proprietary interest in the land. The basic problem which arises here is that there is a fundamental conflict between the free alienability of property on the one hand and the idea of intentional community with its important dimension of self-determination as to who are its members, on the other. If "outsiders" become members simply as a consequence of ownership of an interest in the community land and without any undertaking made to the community or its members, "community" is turned into a mere collection of individuals who share the ownership of property for the time being.

If property is freely alienable it is possible for any one of a number of owners to dispose of the interest held to an outsider without the other owners even knowing, let alone consenting. In some cases this can be done by a chosen act of an owner such as where the disposition of the interest is by a sale. On the other hand there are situations such as death, insanity or bankruptcy of an owner where the law operates in such a way as to give outsiders (personal representatives etc.) a proprietary interest in the land. As already indicated, this might result in the new holder becoming a member of the community, but even if that is not the case, the holding of property rights normally includes the rights to use and possess and to control and administer the property. Those property rights will override any private internal arrangements which have been made by the other owners among themselves. Hence, whether or not a property owner is included in the community, matters not in this respect, because the property rights which they hold cannot be

excluded by the community.

This raises two questions, each with two possibilities.

- (a) Who might acquire a legal interest in the land?
 - (i) where an interest holder sells or otherwise parts with that interest to someone else, or
 - (ii) where outside intervention occurs - eg. death, bankruptcy, mortgagees sale etc.
- (b) What control does any acquisition give a person over the group and the lives of present members?
 - (i) if the property interest is such as to give rights of possession, administration and control - this will affect the group even if the interest acquired by an outsider does not confer membership on the holder. It is hardly possible to prevent such rights from arising without changing the nature of the interest.
 - (ii) if the acquisition of the interest in land automatically confers on the holder, membership in the group (ie. where community membership is tied to property ownership) the former outsider will have a say in meetings, in voting and decision making of the group, including its dissolution and the liquidation of its assets.

5.4 Advantages of property

Despite all the defects, disadvantages and difficulties which property ownership involves, there are a number of factors which lead people to choose a scheme of things to some extent based on ownership of property. The most obvious reasons are those concerned with the security held and control which can be exercised by a group over its land for a long period. In the event of government resumption or acquisition of the land, the owner can claim compensation. In the event of collapse of the scheme

and the dissolution of the community there is an asset which can be realised and in some instances, money available which can be distributed among the members. In neither of these cases is the fact of available monies to be discounted as unimportant. It enables either the community or the individuals to take something with them and make a fresh start.

The fresh start enabled by property is much more difficult where a member-contributor-holder resigns or is expelled and there is no realisation of the whole community assets and no possibility of partition of any share to that member. This is an instance of the conflict between individual security and community security. In general it is the latter which must be paramount. Individuals who seek to live in community with others must appreciate that a personal desire of that kind cannot be met unless the community has security in its property. If the continued existence of a community is under perpetual threat from any of its members who might choose to resign at any time, it is not worth joining in the first place. On the other hand, it might be desirable to organise the property structure in a way which facilitates the withdrawal of members without leaving them bereft of any material means to make a new start elsewhere. However some would argue that the fact of having to say "goodbye" to property invested on admission to membership enhances the sense of seriousness on the part of the prospective member and the community, and hence tends to minimise the coming-and-going referred to.

If property does not normally entail a requirement of positive action by others it might be thought that the legal arrangements can be structured by means of the law of contract. It is possible for people to impose positive duties of action on others through entering into contractual relations with them. However it is precisely at this point that we see one of the advantages of property notions in the structuring

of an ongoing community with a changing membership. The basic limitation of contractual devices to arrange all community legal affairs is the doctrine of privity of contract. This doctrine can be summarised as follows: only the parties to the contract can have any rights to sue or liabilities to be sued under it. In other words, a contract does not confer legal rights nor impose liabilities on strangers to it, although it might be for their benefit. Despite the various inroads which have been made by the law in this area(1), there is still a force in the doctrine of privity of contract which makes contractual relations private.

On the other hand there is not a doctrine of privity of property: the rights and liabilities attach to all holders in due course of a particular property. (2) In other words, however limited the notions of property law are for some purposes, there is the advantage that the rights "attach" to the property and are therefore held by its owner against "the whole world" and not just against those with whom an agreement has been made (eg. the seller). There is therefore an advantage in wedding this feature of property relations, to the other desirable features of contractual relations, in order to achieve the best of both. In some cases, contracts which impose no requirement of positive action and which relate to land can be treated as forms of property (eg restrictive covenants) but in the main we must treat the category of forms of property as closed, in the absence of legislative intervention.

The main advantage of contractual arrangements is the ease with which they can be entered and varied by the parties involved. They therefore tend to informality and this might be seen as highly desirable

1 For example, see Property Law Act 1969-1973 (WA) s.11

2 This principle is borne out in the decision in Beswick v Beswick where the plaintiff failed in "contract" but succeeded as personal representative ie. in "property".

by those who wish to opt out of cumbersome formalities. However, when a contract is dealing with the disposition of land or an interest in land, there are certain evidentiary requirements which the law imposes. So in respect of the subject of this study (ie. land) there is not necessarily any advantage offered by the informality of simple contracts. However even in other situations, that apparent informality is not always a legal advantage. Because of the personal and domestic nature of many of the internal arrangements which are made to sustain community life, the law might consider that there was no intention to create a legally binding agreement and therefore that no contract exists — see Balfour v Balfour. This situation might give rise to questions of severability and the justice of what remains enforceable in court. On the other hand, there is never any legal doubt that ownership of property entails enforceable rights. (1)

The rules of property law present a number of hurdles — some of which I have already mentioned. In legal terms, the "escape" from the doctrine of privity of contract with its unsuitability to meet the needs of structure in a community with a changing population leads us to adopt proprietary forms for some purposes. This is a move from contract to status when viewed from the internal point of view of the community concerned. However the law has "acted" for reasons of wider public policy to prevent property from being tied up so that either:

- (a) the property itself cannot be used, or
- (b) the interests created in it are completely or virtually inalienable.

In our attempt to adapt a community structure to a long-term property holding arrangement we can run foul of a number of legal rules, including the Rule against perpetuities. Most of these rules are too technical to

1 This does not mean that property is always dealt with simply in terms of the rules of property law, eg. in the case of a dissolution of marriage the distribution of property is within the discretion of the Family Law Court which does not have to follow the rules of property as to who is the owner of what, etc.

discuss in a general study, but their existence should be noted and if necessary their effect discussed with a legal advisor.

The juxtaposition which I have presented as between contract and property is the legal dimension of an important distinction which should be made in structuring a community and its property ownership. Unfortunately this distinction is very rarely made:

The form of property holding should be considered distinct from the form of business organisation (1) - they might run together in fact but do not necessarily do so in principle.

To separate the property holding requirements from the business organisation requirements, amounts to allowing that investor-owners of land are not necessarily the members or residents of the community which uses the land. It allows different persons to be involved in each aspect and different structures to be established to cater for the ends to be served. In effect this means that it allows for a greater variety of roles although the same persons might hold those roles. Insofar as it sets up a variety of forms of commitment to a community it also permits a wider circle of involvement.

There are many people who are in sympathy with alternative lifestyles who are unable to be directly involved in the resident life of an intentional community. But they might be happy to put money and property at the disposal of such activities rather than in the bank or other forms of investment. In some cases the investor expects no financial return on the investment - their return is existential. In one rural community in Australia the land has been acquired by the contribution of shareholders, some of whom do not intend to live on it - they simply believe in what they have done for the conservation of the land.

1 By "business organisation" I mean the arrangement of those community affairs which involve the outside world, such as making contracts, decision making, announcing official policy, voting in local government elections, etc.

In addition, there are people in residence on that land who have not contributed to its acquisition and are not shareholders, because it is contrary to their principles to own any property. (This is a fascinating example of a human symbiotic relationship).

5.5 Informal social structure distinguished

The business organisation is often structured in a written constitution which deals with the ongoing relations between the group and the world outside. It is the formal face which the community presents in its wider environment. But it must also be distinguished from the informal social structure and the realities of the personal relations within the group. To make this distinction is not to see them as poles apart. The type of business organisation will influence social relations at least to some extent, and obviously the social relations will affect the operation of the business organisation. However, the business organisation is more static and operates towards the world outside. In other words, they have different environments.

6 PROPERTY HOLDING ARRANGEMENTS

Broadly speaking there are two possible arrangements for property holding (whether freehold or leasehold):

- 6.1 Sole proprietorship - where property is held by one person whether a natural person or a legal person (eg. a company).
- 6.2 Co-ownership - where undivided property is held in possession by a number of persons simultaneously, either as tenants in common, or as joint tenants. (1)
 - 6.2.1 Tenancy in common arises where the interest of the co-owners in the property is severed in the separate shares (2) which might be equal or unequal, although the land itself is undivided and therefore a co-owner has a share in the whole land.

There is unity of possession, which means in effect that for some purposes the possession of one co-owner is the possession of them all and the right of one to possess the whole of the land cannot exclude any of the others. The name of this type of co-ownership is significant in the light of what I have said about the problem of the commons.

On the death of a co-owner the interest in the land which was held by the deceased passes to his personal representative for distribution under his will or on intestacy.

- 6.2.2 Joint tenancy arises when there are "four unities" present - ie all co-owners must
 - (a) hold the same (3) interest in the land
 - (b) acquire their interest under the same title document
 - (c) acquire their interest at the same time, and
 - (d) be as entitled to possession of any part of the land as any of the

1 The word "tenant" in this context means, holder.

2 The word "share" is etymologically related to "shear", hence the idea of severance.

3 With reference to unities, "the same" means qualitatively identical rather than merely quantitatively equivalent, ie. "unity" is not another word for "equality".

other co-owners (this is the only one of the unities that applies to a tenancy in common).

Unlike tenancy in common, a joint tenancy involves survivorship. On the death of one of the co-owners (joint tenants) the interest which was held during life is extinguished and the other joint tenants continue to hold the whole interest in unity until there is only one left alive who then becomes the sole owner of the property.

Misunderstanding often arises about the legal capacity of joint tenants to sell or otherwise dispose of their interest in property prior to death without the consent of the other joint tenants. This is possible although the person who takes the interest transferred by the joint tenant will enter as a tenant in common with the other co-owner(s) (they will remain joint tenants among themselves if there are more than one). This is because the severance of a share from the joint tenancy which is necessary to transfer to the incoming co-owner, severs the joint tenancy (1). It is therefore possible to have a joint tenancy "within" a tenancy in common.

6.3 Co-ownership - advantages and disadvantages

The more usual form of co-ownership adopted by intentional communities is the tenancy in common. This has the advantage of simplicity in its formation, and, provided the membership of the group is small and stable (most unlikely!) it will suffice as a passable property holding arrangement. On the other hand it gives little security to the ongoing community and does not protect group autonomy from the property claims of individuals (who, as pointed out earlier, might be strangers to the community ethos and ideals). This form is probably most suitable in

1 A form of co-ownership which involved survivorship and also required all co-owners to be joined in any transfer which divested the others of that right, did exist and was called "tenancy by entireties". Its revival and adaptation could be useful in structuring the property arrangements of some communities - perhaps including aboriginal communities.

the case of a collective where the notion of community is weakest. It can be sophisticated by the mutual granting by the co-owners of options or rights of pre-emption in the others in the event of one of them seeking to dispose of the interest held. But this sophistication is not without its legal difficulties.

This form of property holding is not readily tied to any particular business organisation except perhaps a partnership. In addition it lacks any rules of its own to govern the internal relations of co-owners as to use of the land etc. Where problems arise, the main legal solution is partition of the property or of the money realised by its sale, and distribution among the former co-owners. Although it would be overstating the case somewhat to say that the law is biased against collective ownership, it is certainly true that it finds it easier to operate in a world where one thing has one owner.(1)

6.4

Trusts

Although trusts are not regarded by the law as a form of co-ownership there is a sense in which they are such a form. A trust arises where one or more persons (trustee) hold the property for the benefit of some other person or persons (beneficiary). Hence there is a legal owner or owners and a beneficial owner or owners concurrently interested in the trust property (If we regard trusts as the concern of property law (2) it will explain why they are enforceable in court by a beneficiary without the need for any contract).

Even if the relationship which exists between a trustee and a beneficiary is not to be regarded as co-ownership, in the event that there are more than one of either of the trustees or the beneficiaries,

1 This is probably an underlying idea in the English institution of primogeniture - see Carr pp 18-19.

2 I am attempting to leave out unnecessary complications such as the historical distinction between legal and equitable estates and interests.

a co-ownership situation arises. It is normal for trustees to hold property as joint tenants in order to get the benefit of survivorship in the event of a trustee's death. Otherwise the deceased trustee's personal representative (eg. executor of the will) would be required by law to join in with the surviving trustees to administer the trust property. Through joint tenancy the surviving trustees alone will own the property and it will be possible for them to administer it, including bringing in a replacement trustee by all joining in a transfer of the land to themselves and the new trustee jointly. A changing population (as beneficiaries) does not present the same problems of legal formalities because there is no need to register changes of ownership at the Land Titles Office. Therefore, if instead of registering members as tenants in common on the certificate of title, they hold as beneficiaries with the trustees (who are either members of the community or not) as registered proprietors, the changing population causes fewer hassles.

As mentioned elsewhere (1) trusts are a device which was evolved to protect community property and aristocratic family estates from seizure by a greedy Crown. The trust separates the public face of the property (in the form of the trustee who is the legal owner with the power to administer and control) from the private benefit to which it may be put (in the form of the persons or purposes which are beneficially entitled to the produce, profits and progeny of the property). In this respect it retains the essentially private and family nature of its origins which results in simplicity in its formal relations with the outside world and its flexibility in making internal changes. The arrangement is drawn up in a trust deed or a declaration of trust.

1 See section 4.6.1

Lest anyone should get the idea from this that the law of trusts is simple and easy to understand, I should warn that trusts involve a complex and technical system of rules which it would be out of place to discuss here. However a number of general principles can be outlined. Trusts fall into two broad categories:

6.4.1 Public trusts

where the trust is to benefit purposes which must be charitable within the narrow definition which the law places on the word "charitable".⁽¹⁾ Some alternative communities could be constituted as charitable trusts although for most this form would be unsuitable and undesirable. It solves a lot of the property holding problems because the members have no direct entitlement to the benefit of the trust property, but there can be separate property held by the community apart from the trust property. In addition charities are not subject to the rule against perpetuities. The artists community, "Monsalvat" in Victoria is constituted as a charitable trust. Because such trusts are public they can be "supervised" through the courts by the action of the relevant State Attorney General. In a small community with charitable purposes, it would be possible for the members to act as the trustees.

6.4.2 Private trusts

where the beneficiaries are persons. In the case of intentional communities we can assume that any trusts would be expressly set up as their property holding arrangement. A number of points need to be borne in mind.

- (a) The person who creates the trust (the settlor) must have legal capacity to do so,
- (b) There is a requirement of three "certainties":
 - (i) the intention to create a trust - if absent, the property is

¹ For public benefit and for either the advancement of religion, the relief of poverty, the furtherance of education, or some other cause which the court considers to be worthy of being accorded the "status of charity".

taken as a gift and not held on trust for anyone

- (ii) specified property must be the subject of the trust
- (iii) there must be ascertainable beneficiaries.
- (c) An agreement to create a trust is not a trust and is only enforceable under the law of contract, (1) although the beneficiaries under a fully constituted trust do not have to rely on contract for its enforcement.
- (d) In general, where the trust property is land, the trust must be constituted in writing.
- (e) Where natural persons act as trustees there might be a need for replacement in the event of death etc.
- (f) Trustees only have the power to act in accordance with the trust deed, the principles of equity and the Trustees Act of the relevant State. Usually a power to mortgage land must be specifically conferred.
- (g) The trust property might be available to be seized to pay the private debts of the trustees owing to their creditors, ie. separate from the trust debts, in some rare cases.
- (h) The Torrens system of land registration precludes the possibility of trusts over land being registered on the certificate of title, but a caveat can be lodged on behalf of any beneficiary to protect the claim to the beneficial interest held.
- (i) There is no requirement to register a trust, nor to file any annual statement or return - apart from laws relating to taxation where applicable.

Two kinds of private trust are worth a mention so as to be considered in choosing a structure:

- (a) the unit trust, where contributors buy (and sell) "units" as

1 See Meagher and Gummow p 67

beneficial owners (unit holders) from time to time in accordance with a deed of unit trust. As the community membership or scheme expands it is possible for more units to be issued and taken up.

It is a method which has often been employed by families.

- (b) the secured note trust deed (somewhat similar to both a debenture and a promissory note) whereby the land is held subject to a charge in the control of a trustee on behalf of noteholder-beneficiaries whose interest may be caveatable. This method which was employed by John Grace in the structure of Nathania in W.A., allows for the raising of capital against land as a security either with or without interest, and is free of legal formalities. If the trustee is a natural person the provisions of companies legislation do not apply as to the issue of debentures.

In legal terms, the difference between the unit trust and the secured note trust is that in the former the holder has a beneficial interest in the land (subscribe for an equity) whereas in the latter the holder's interest is in a debt (noteholders must be paid out first before anything is available to be distributed to the beneficial owners).

7

BUSINESS ORGANISATION

Whereas the property holding arrangements are usually fairly static, the business organisation is set up to deal with the dynamic operational context of the community in its use of its property and its relationship to the outside world.

7.1

Constitutions

For this purpose a group has a constitution which may be either:

- (a) written and formally consolidated in one document, or
- (b) written but informal and not consolidated in one document, or
- (c) unwritten (such as Australian Aboriginal "tribes".)

Essentially a written constitution is a device to specify the permissible bounds of power which may be exercised in the group and on its behalf, and to clarify the shared expectations of its members. It is therefore a "left-wing" device which regardless of its content in any particular case, points to the fact that power is to be exercised for the benefit of the whole community and not in an arbitrary and capricious way simply according to the whims and fancies of any individuals - including the majority.

7.1.1

Voluntary

The constitution of any voluntary group is vastly different from those of involuntary groups. This is a moral difference in the opportunity which the former presents to all its members to remain in membership or to leave. We only need to compare a club or voluntary association with the modern nation-state to see this difference. In the latter case, one does not apply to join and there is no legally recognised way to resign without becoming the subject of another sovereign State. The contrast with intentional communities is obvious because no one can be born a member of same. The voluntariness and lack of coercive machinery (except perhaps the capital "penalty" of expulsion)

in these groups has its advantages and its disadvantages. But it carries with it the moral responsibility of every member who remains in the group to recognise and live by the shared expectations of the whole community as expressed in its consensual constitution. A good constitution should balance the 'I' and 'me', on the one hand, with the 'we' and 'us' on the other.

7.1.2

Diversity

The amount of choice, diversity and pluralism which is available within a constitution depends in large measure on the population size of the group. In general, intentional communities are small (often far too small) and therefore the diversity cannot exist so much within them as between them. However, although larger groups usually make more diversity possible, they also require more formality in their internal government. But whatever the size of the group, there is a diversity in the types of decisions that have to be made in its government and hence a diversity in the procedures suitable for decision-making. In some cases a decision should be made by members in meeting, in other cases by an individual appointed to that task, and perhaps in some cases even by a subgroup from the members, and in special circumstances the decision might be referred to someone outside the community for the sake of expertise or impartiality. There can also be a diversity in the legal structures used for different community aspects or activities eg. a structure which includes a corporate body, a trust and a partnership.

7.1.3

Change and transition

In view of the fact that a community's external and internal environment can be expected to change, its constitution should not be a straight-jacket which prevents it from effectively meeting new situations.

There are a number of provisions usually inserted in constitutions to allow for formal changes. Probably the most important of all provisions are those which specify the terms of its amendment and the procedure

for dissolution of the group and disposition of its assets. These two provisions will determine where ultimate power in the group lies, and they should be drafted carefully with that fact in mind.

At the individual level the significant changes include the admission of new members, the termination of membership and the means by which new obligations can be imposed on members. These provisions involve another kind of transition and change, but they are obviously important in the life of an ongoing community. I have already discussed the difficulty involved in allowing for these changes in a system where members have some sort of proprietary claim to the community property (especially land).

One of the features of a community which it is undesirable to change (at least too often) is its name. Therefore it should be well chosen at the outset. A name is a property of the group and part of its property.

7.1.4

Constitutions and other legal documents

Although I am using the word "constitution" I do not mean to imply that every community must have a separate document which it calls its "constitution". Even the distinction which I have made between property holding arrangements and business organisations does not mean that the documentation must be separate. The constitution of a community which is incorporated under the Companies Act of the relevant State will be its memorandum and articles of association. In the case of a trust arrangement the trust deed might serve as the constitution and where a partnership is the adopted structure there might be a written partnership agreement. On the other hand a group might prefer for psychological reasons, to not have its constitution and its property holding legal arrangement tied together in the same document. But there is a sense in which a constitution is a form of property, and in some associations where

membership is by shareholding a right of voting is a property right.⁽¹⁾

With reference to the enforcement of rules in a constitution or any other legal document, in general a court does not supervise or interfere at all unless the matter is brought before it by someone for adjudication. In the absence of any breaches of the law or any internal disputes which are taken to court by someone, the judges who would otherwise have to sit in court, will be able to play golf (which is better for everyone). Usually a constitution provides for a method for the settlement of internal disputes.

7.2

Two types of business organisation

Business organisations are legally structured either as corporate bodies or unincorporated bodies. The essential difference between these is that a corporate body has the legal standing of a separate person - quite distinct in its rights and liabilities and its powers and duties from those who are its members from time to time. On the other hand, an association of persons which is not incorporated at law is not treated as a separate legal personality. Despite what Stoljar argues (that the distinction between the incorporated and unincorporated association is not as clear-cut as is commonly supposed) there is an essential difference for the purpose of this study. An unincorporated association cannot hold land as a separate legal person in its own name (although it can have natural persons as trustees to hold on behalf of the association).

Arising out of its separate legal personality, an incorporated association has a number of features including:

- (a) perpetual succession of its rights and liabilities which are separate from those of its members - and therefore it is said that

¹ See: Osborne v Amalgamated Society of Railway Servants and also: Amalgamated Society of Carpenters and Joiners v Braithwaite.

"it does not die", and it has a common seal (the corporate "signature");

- (b) it is unaffected by changes in the legal status of its members - it persists regardless of their death, bankruptcy, marriage, divorce, insanity etc.
- (c) it is public and is accorded legal protection for its name;
- (d) it acts as a "shield" against personal liability of members in respect of its separate debts and obligations (they are only liable to pay for their shares, or to pay their subscriptions).
- (e) it may hold land and other property separate from its members;
- (f) it may sue and be sued in court;
- (g) it may be liable for income tax.

These features give rise to certain advantages with respect to land holding. It is possible for a body to be incorporated to hold land and to take the legal responsibility of maintaining the land, to shield members from any claims made in respect of it - including public liability as an occupier, for injury suffered by those who visit the land. The land is held by the corporation as a sole owner and not by the members as co-owners. In this respect there is no requirement to change the title registration of the land with changes in membership because the corporation remains the same distinct person through all such changes. However it is possible in some cases for a corporation to hold as a co-owner with other persons if that is needed.

Another advantage is that incorporation expresses the notion of community as well as any legal device could do, particularly a community of the collegiate type. Its ongoing, almost "transcendent" character which is given a form or body in its membership, is focused in its aims or objects. These are the reason for its existence, and therefore, represent the unity of its members. A corporation presents to the world the idea of oneness of "body" or corpus, to be considered holistically rather than as a mere collection of individuals who for the time being share a

common purpose. The members have not simply formed or joined a team to get certain advantages that come through collective action, they have formed one body. That body can in their thoughts and actions be held to include as well as themselves, the past members and those of the future, and perhaps even other forms of life as well. (This is beyond the bounds of legal understanding!).

The fact that most incorporated bodies have the purpose of commercial profit, does not detract from this idea. Historically, the incorporation of towns, universities, churches, monasteries etc. is much older than the more modern use of the corporate device for commercial undertakings. The fact that the corporate unity arises from the aims or objects means that these have to be articulated by the founders at the outset, and everyone who joins (including the founders) do so in acceptance of those corporate goals. In addition, the corporation only has legal power to act for the furtherance of its constitutional aims. These advantages are not obtained without a price. In general the disadvantages of a community adopting a corporate structure are:

- (a) it requires more formality to establish, and to operate and to change and to dissolve;
- (b) there is consequently greater expense in all these aspects⁽¹⁾;
- (c) it is public in that the "constitution" is registered at the discretion of the State and available for public scrutiny;
- (d) it might be subject to separate tax and to the requirement to file an annual statement of affairs,
- (e) it sets up a long-term structure which is unsuitable for many communities, particularly where acquired land is to be leasehold rather than freehold.

1 These points are general only ie. as to business organisation. The overall running costs might be less if the property holding arrangements are taken into account eg. if the expense of amending the land registration under co-ownership every time someone leaves or joins, is added in.

It is legally possible to incorporate a number of separate bodies to carry out different functions, or to structure a community by establishing a "mixture" of legal devices. For example, a corporate body might be useful as legal landholder and trustee on trust for the members, or the contributors.

7.2.1 Unincorporated associations

The more informal and less legally rigid structure which is available in unincorporated associations will appeal to many people who seek an alternative lifestyle. It can be constituted by a group of people without any registration or formality, and with minimal expense - simply by their associating to carry out a common purpose. The rules of the association can be changed with relative ease. These are its advantages. However, there is no limit on the personal liability of members. In addition an unincorporated body provides no means to facilitate the holding of land and the legal dealings with the land. This is its main disadvantage and the points to consider in this respect, I have already discussed under "the search for a structure" and "property holding arrangements".

The general rule about property is that on a winding up of the association the members at that time are entitled to an equal sharing in its distribution. Thus it is said that,

"...members of an association have a joint interest in their common property, none has a partible or disposable interest, he has only an interest in common with other members, under the control of the whole membership and in accordance with the decisions of the majority." (1)

7.2.1.1 Partnership

A partnership can be considered as a special form of unincorporated association which is established for the purpose of profit. It could be a suitable structure for some communities, as discussed by Drew.(2)

1 See Stoljar p 77

2 University of Queensland Law Journal

However, the fact that it is basically a form for a commercial enterprise is likely to turn people off. The point of a community has a lot to do with notions such as home and life, but much less to do with commercial profit. There is no question that community has to be economically successful in order to survive and remain viable but that does not mean that it has to be financially or commercially successful, ie. in monetary terms. This is not the same as the position that Drew attempts to counter. He seems to deal with the question of how the law should settle 'disputes' about a community which exists without much legal thought or structuring. A partnership is an instance of (a) contractual relations, (b) agency relationship, (c) business organisation, (d) property holding.

Although a partnership structure is suitable for some collective-type communities, it has limitations. It can only cater for groups of up to 20 members as partners. This legal restriction is necessary in part because a partnership does not have a separate governing body (such as a Board of Directors), the business is under joint management. The ease with which a partnership can be set up without any written or oral agreement between the partners, but simply by their course of conduct towards each other, might be a disadvantage. Even the terms of a written partnership agreement can be changed by the agreement implied in the partners' later course of conduct of the business without any express agreement made between them. But the Partnership Act fills in the gaps in the absence of agreement on any particular matter, so it can act as the group's constitution. Because it is possible for children to be partners, the legal position of any children in a community would need to be considered.

If the absence of limited liability is the only reason why an ordinary partnership is unsuitable for a particular community, a limited partnership might be appropriate. This provides limited liability for all partners except the (dormant) partner who must take no part in the management of the business. However it is not available in all parts of Australia.

Regardless of the type of partnership, there are two other matters that should be considered:

- (a) the requirement to register the business name if (as is probably the case for a community) it is not the name of all of the partners; and
- (b) the requirements with respect to taxation.

7.2.2 Incorporated associations

This term is used with a degree of looseness in this context to cover the other business organisations.

7.2.2.1 Friendly societies legislation

It has been held that friendly societies may establish a regular community of united interests such as to realise an Owenite ideal (1). However the usefulness of this form needs to be considered in each case in the light of the legislative provisions applicable to such societies in the relevant State.

7.2.2.2 Associations incorporation legislation

Western Australia, South Australia, Tasmania and A.C.T. have legislation provisions which enable the incorporation of associations established for purposes deemed suitable, (2) but not for the pecuniary profit of members. These associations are required to include constitutional rules which preclude the holding of any shares by members, and the payment of any dividends or other distribution of property or profit to members in any event, including the winding up of the association. On the other hand there is no legal reason why such a body cannot be set up with the power to act as a trustee and hold property for the benefit of its members separately from its own property. The method of incorporation is not too cumbersome with formalities and expense, and there are few

1 Pare v Clegg

2 It is unlikely that this legislation would be available to incorporate communities of either the collective-type or the communal-type but it is available to those nearer to the collegiate-type, eg. Yinma Gild in W.A.

formalities which have to be complied with in its operation - at least in Western Australia. There is a requirement that the word "incorporated" be used in the name for all official purposes. The shield on personal liability which incorporation provides is lost whilst the association fails to keep the register up-to-date: this is a formidable sanction. Yet a further advantage is that the legislation does not require the internal government to be carried on by a committee or subgroup of the whole. There is no legal reason why a group cannot be incorporated in a State different from that in which the land is to be held, although the requirement to have a registered address in that State would usually be a practical difficulty.

Although it is not uncommon for the word "trustee" to be used in constitutions referring to those who have custody of the common seal and authority to countersign its impression, this use of the term is not strictly correct. Being incorporated as a matter of law, the body does not need trustees in the form of natural persons to have the title to its property legally vested in them. This is a need which is removed when the body ceases to be unincorporated and can therefore hold and own its property, not just beneficially, but in its own right.

7.2.2.3 Cooperative societies legislation

Although in all States there is some form of cooperatives or cooperation legislation, it is only in Victoria, N.S.W., Queensland and A.C.T. legislation is suitable to the needs of alternative communities. The interesting thing about this legislation is that it exists to facilitate such groups (of adults) in taking up land and settling on and improving it in the form of communal ownership. This is made possible under the legislation by the incorporation of "community settlement societies". The name of any such society must include the word "cooperative" and the last word, either "Limited", or "Ltd." In each of the States

mentioned, there is maintained a registry office which through its officers is available to give advice or assistance to any group as to its establishment or operation as a society. Model rules are available and these may be varied by the rules adopted by the community.

In addition to this administrative assistance and advice, there is no fee payable for registration and there is exemption from stamp duty on the transfers of shares of a community and on the transfer of land to it. This is a reasonable subsidy which costs the government very little but aids such groups a great deal. Furthermore the State Treasurer may guarantee the repayment of any loan made to a cooperative society. Some of the largest alternative communities in Australia are structured under this legislation - including Moora Moora in Victoria and another near Tunttable Falls in the north of N.S.W.

There are disadvantages in this form of business organisation which makes it unsuitable for some communities:

- (a) the Registrar can disallow rules which are not "reasonable" (ie. by the Registrar's standards).
- (b) no one member may hold more than a certain proportionate value of the total shareholding (although the requirement of consent to be given on behalf of the community for any transfer of shares is good for community autonomy).
- (c) control and management is vested in a board of directors (numbering in excess of 3 but not more than 7) and a majority of members in general meeting cannot interfere in the board's administration or direct how the directors shall act in a certain matter and

neither can the directors be removed by a general meeting during their term of office.(1)

- (d) there are a number of "bureaucratic" formalities and requirements to be complied with from time to time. In this respect the legislation makes insufficient distinction between residential communities and other types of cooperative society, eg. that a residential situation makes possible a great deal of informal communication and agreement.

7.2.2.4 Companies legislation

Many of the points which I have made about cooperatives also apply to private companies,(2) but there are some differences as well. One of the main differences is that the government aid which is given to cooperative communities is not normally available to companies (which come within the framework of commercial legislation). As a result, there is greater expense in establishing and perhaps in operating a company, although the main bureaucratic requirements are little different. Because companies "go it alone" there is not merely more expense but also a greater degree of freedom and less supervision as to what rules the group may adopt. However there is the legislative requirement for the existence of a board of directors.

I have argued for a separation of property rights from the right to control the course of the community's business (including the use and development of its land). This is not fully achieved in the distinction between shareholders and directors (as owners and controllers respectively)

1 It was because the legislation in Victoria does not allow the overall membership to have the right to expel members who cease to abide by the conditions of their membership, that Sunrise Farm Community was incorporated under the Companies Act as a private company. Those conditions were:(a) no carnivorous pets allowed except by leave of 15% of membership (b) no raising of animals for slaughter or sale and slaughter, (c) no mind-altering drugs to be used by members.

2 Although it is not beyond the bounds of possibility to use a public company structure (where shares are traded on the stock exchange) to raise capital to purchase and develop land for an intentional community, it is not likely to happen.

although it goes some part of the way. The sort of control that is needed allows the resident-workers of the community to run the day to day management of the land etc. A company structure which makes all adult resident members of a community, the directors of the company but allows other (non-residents) to be shareholders (as well as the directors) is the sort of arrangement needed. This enables changes to occur in the resident membership of the community without interruption of proprietary rights.

There are two kinds of private limited liability company which are worth considering:

- (a) those limited by shares
- (b) those limited by guarantee

Of the former kind, there could be more use made of the old style home unit company as a basis for community structure. In these companies the shares are divided into groups of shares and the Articles of Association attaches certain rights to occupy and use particular portions of the company's land to the holder of each share group. In effect this means that there are rights of leasehold (or something analogous) in shareholders as to specified parts of the land. All the land does not have to be split up in this informal, internal subdivision. Because the company owns the whole of the land, it remains entitled to occupy the land which is not excised from the whole. This form of land use arrangement was the method used before the introduction of strata titles. Many of its "disadvantages" would not apply to communities if it were adopted as a structure.

The disadvantages of home unit companies which led to the establishment of strata titles schemes mainly arose from the fact that the shareholder in any company which owns land, has no property interest in the land but only an interest in the company (ie as the owner of shares). (1)

1 Shares are personal property, not land, even if land is the sole asset of the company.

It was therefore impossible for shareholders to raise mortgage finance to pay for their home units using land as a collateral security, or to sue a trespasser who might unlawfully enter their premises, etc. The company alone had the rights of a landowner. More recently it has been held that any such company can alter its Articles by special resolution, and it cannot have rules which prevent itself from so doing (1). Hence it is possible for special rights attaching to shares to be adversely affected by future resolutions (in the absence of fraud on the minority etc.).

7.3 Other organisations

7.3.1 Strata titles legislation (including cluster titles)

There is a certain artificiality in discussing this form under the heading of "incorporated associations", although the legislation does provide for a corporate body to control the common land, levy upkeep charges, and perform other minimal functions. The corporate body consists of the owners of the separate strata lots which are subdivided (2) within the scheme under the name of the building. For some purposes the owners of the lots are treated as tenants in common of the whole of the land. Thus, a strata titles scheme is a complex arrangement consisting of subdivision into distinct lots with separate titles, co-ownership, corporate structure, easements, and common land.

Subdivision in some cases is based on a building and each separate lot is defined in terms of walls floors and ceilings. This is a defect which makes such a scheme unsuitable for some communities, particularly rural. Because the legislation precludes any restriction on the free alienability of the titles, they may be bought and sold on the market. This means that the community has no more control over its members

1 Crumpton v Morrione Hall Pty. Ltd.

2 Because it is a subdivision the approval of the relevant authority in each State is needed.

than people have over who are their neighbours in a suburban street. So although a strata scheme might be implemented by an intentional community, the passage of time might undermine the intentional nature of the residential arrangements. This is not always a bad thing.

Urambi Village in the A.C.T. consists of about 75 separate strata title residences of the "town house" variety, and was "planned" built and developed by the residents themselves starting from an original core group. The main advertising was by word of mouth, a feature shared with most intentional communities. There is no filter on who may buy in (there have been instances of sale by members and renting to "outsiders") although the idea of vetting incoming residents for "suitability" was proposed at the early discussions. There are difficulties which arise (through no fault on anyone's part) when a person buys in without being told of the requirements of the scheme eg. to take part in working bees (which not only enable the quarterly levy to be lower than it otherwise would be but also help to build a sense of community among the residents.)

In terms of size and diversity of the operation involved in developing the Village, much can be learnt from Urambi. Initially the "Urambi Cooperative Development Society" was established to proceed with staged development. There is a fair degree of informal community eg. shared car pools, child minding arrangements. Most of the difficulties are experienced in relation to "the commons" and general maintenance and improvement. One of the reasons the scheme works as well as it does is the size of its population. Within the Village it is possible for groups of residents to share some things with each other without giving offence by appearing to exclude others. These subgroups can operate as informal communal arrangements within the pluralistic environment of

the larger collective-type community.

One of the main defects common to strata title legislation is that it does not allow sufficient options to those who wish to develop a strata title scheme. It appears to be drafted as a straightjacket into which all such schemes must be fitted.. Little more can be said at this point because the various Acts vary considerably from State to State.

7.3.2 Subdivision into separate lots

The possibility of forming a community where the land holding of members is by separate lots, should be mentioned, but it is not a form of business organisation. Each "member" of the "community" owns a separate piece of land as sole proprietor - in the manner of the suburbs (and Jackey's Marsh, Tasmania). It is even closer to an individualistic collective-type arrangement than the strata titles system because it lacks the integration that such systems have. If community spirit and sharing evolve in such circumstances it is out of either necessity or accident (whichever occurs first!)

CONCLUSION

The most important idea for an individual or a community seeking sanity in an alternative environment is balance. In its nature, balance is dynamic and to some extent precarious and uncertain - at least in the absence of dogmatism. The problem of environmental degradation arises mainly because of lack of balance - the environment is being unbalanced by unbalanced people and unbalanced lifestyles. (We have become too big for our boots and are therefore spilling over, all about the place, with savage environmental consequences.)

The balance which is needed includes harmony with the natural world, as one animal species in the web of biological and physical interrelationships which comprise the biosphere. In the human environment balance is required as a fundamental determinant of fulfilling and rewarding relationships with others, and also of institutions which facilitate human freedom and justice. In structuring a community there is a need to balance a number of factors in order to create a viable and enlightened environment. On the one hand there is community security and on the other there is individual liberty. The centrifugal individualistic tendencies must be balanced with the centripetal hold of communal responsibility. If the former become overwhelming the community disintegrates and individuals lose the freedom of living in community with others. But if the latter become too powerful there is a risk that the creative possibilities of the individual members will be crushed and the community will become sterile.

Structure and flexibility, formality and informality, security and liberty, - all must be balanced if there is to be community and freedom. Neither is the required balance limited in its application to the factors which constitute the environment which is internal to the community concerned. The wider social, economic and legal environment in which the community operates must also be considered. In this respect

it is often difficult to balance the desired internal structure of community with the legally possible structural forms of property holding and organisation. In many cases, the solution to these problems is easier if a larger group with a more complex structure acts as the "shield and buffer" for smaller community groups or clusters within it.

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Osborne v Amalgamated Society of Railway Servants [1911] Ch 540

Pare v Clegg (1861) 29 Beav. 589

STATUTES CHECKLIST

(In order to avoid a cumbersome list which includes all the relevant Acts in each State, I have set out below only those which are applicable in Tasmania to serve as a checklist on the basis that the comparable legislation in other States can be considered.)

Associations Incorporation Act 1964

Business Names Act 1962

Companies Act 1962

Conveyancing and Law of Property Act 1884

Co-operative Housing Societies Act 1963

Co-operative Industrial Societies Act 1928

Friendly Societies Act 1888

Landlord and Tenant Act 1935

Limitation Act 1974

Limited Partnerships Act 1908

Local Government Act 1962

Partition Act 1869

Partnership Act 1891

Public Trusts Act 1882

Real Property Act 1862

Settled Land Act 1884

Trustee Act 1898

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(a) the structures of the following communities were taken into account

Conservation Farming Society, W.A. (and Clubs)

Illusion Farm, (Gorilla Stud) Tas.

Jackey's Marsh, Tas.

Montsalvat, Vic.

Moora Moora, Vic.

Nathania, W.A.

Paradise Valley, N.S.W.

Satyananda Ashram, N.S.W.

Sigma, W.A.

Sunrise Farm, Vic.

Tagari, Tas.

Tuntable Falls Cooperative, N.S.W.

Urambi Village, A.C.T.

Waterworks, Tas.

Yinma Gild, W.A.

and various other small urban communities in Hobart

(b) I received some guidance from Messrs G Bates, P Gunn, R Jones, J Livermore, M Stokes and J Todd, all of the University of Tasmania

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EPILOGUE

(from Arcadian Adventures with the Idle Rich by Stephen Leacock)

"...Such was the situation of the rival churches of St. Asaph and St. Osoph as the autumn slowly faded into winter...Nor were even these things the most momentous happenings of the period, for as winter slowly changed to early spring it became known that something of great portent was under way. It was rumoured that the trustees of St. Asaph's church were putting their heads together. This was striking news. The last time that the head of Mr. Lucullus Fyshe, for example, had been placed side by side with that of Mr. Newberry, there had resulted a merger of four soda-water companies, bringing what was called industrial peace over an area as big as Texas and raising the price of soda by three peaceful cents per bottle. And the last time that Mr. Furlong senior's head had been laid side by side with those of Mr. Rasselyer-Brown and Mr. Skinyer they had practically saved the country from the horrors of a coal famine by the simple process of raising the price of nut coal seventy-five cents a ton and thus guaranteeing its abundance.

Naturally, therefore, when it became known that such redoubtable heads as those of the trustees and the underlying mortgagees of St. Asaph's were being put together, it was fully expected that some important development would follow.

It was never accurately known from which of the assembled heads first proceeded the great idea which was presently to solve the difficulties of the church. It may well have come from that of Mr. Lucullus Fyshe. Certainly a head which had brought peace of a civil war in the hardware business by amalgamating ten rival stores, and which had saved the very lives of five hundred employees by reducing their wages fourteen per cent, was capable of it.

At any rate, it was Mr. Fyshe who first gave the idea a definite utterance. "It's the only thing, Furlong," he said across the lunch table at the Mausoleum Club. "It's the one solution. The two churches can't live under the present conditions of competition. We have here practically the same situation as we had with the two rum distilleries - the output is too large for the demand. One or both of the two concerns must go under. It's their turn just now, but these fellows are business men enough to know that it may be ours tomorrow. We'll offer them a business solution. We'll propose a merger."

"I've been thinking of it," said Mr. Furlong senior. "I suppose it's feasible?"

"Feasible!" exclaimed Mr Fyshe, "Why, look what's being done every day everywhere from the Standard Oil Company downwards."

"You would hardly, I think," said Mr Furlong, with a quiet smile, "compare the Standard Oil Company to a church?"

"Well, no, I suppose not," said Mr Fyshe, and he too smiled - in fact he almost laughed. The notion was too ridiculous.

One could hardly compare a church to a thing of the magnitude and importance of the Standard Oil Company.

"But on a lesser scale," continued Mr Fyshe, "it's the same sort of thing. As for the difficulties of it, I needn't remind you of the much greater difficulties we had to grapple with in the rum merger. There, you remember, a number of the men held out as a matter of principle. It was not mere business with them. Church union is different. In fact, it is one of the ideas of the day, and everyone admits that what is needed is the application of the ordinary business principles of harmonious combination, with a proper - er - restriction of output and general economy of operation.

"Very good", said Mr Furlong. "I'm sure if you're willing to try, the rest of us are."

"All right," said Mr Fyshe, "I thought of setting Skinyer, of Skinyer and Beatem, to work on the form of the organisation. As you know, he is not only a deeply religious man but he has already handled the Tin Pot Combination and the United Hardware and the Associated Tanneries. He ought to find this quite simple.

* * *

Within a day or two Mr. Skinyer had already commenced his labours. "I must first," he said, "get an accurate idea of the existing legal organisation of the two churches."

For which purpose he presently approached the rector of St. Asaph's.

"I just want to ask you, Mr Furlong," said the lawyer, "a question or two as to the exact constitution, the form so to speak of your church. What is it? Is it a single corporate body?"

"I suppose" said the rector thoughtfully, "one would define it as an indivisible spiritual unit manifesting itself on earth."

"Quite so" interrupted Mr Skinyer, "but I don't mean what is it in the religious sense: I mean, in the real sense."

"I fail to understand," said Mr Furlong.

"Let me put it very clearly", said the lawyer. "Where does it get its authority?"

"From above", said the rector reverently.

"Precisely," said Mr Skinyer, "no doubt. But I mean its authority in the exact sense of the term."

"It was enjoined on St. Peter.." began the rector, but Mr Skinyer interrupted him.

"That I am aware of," he said, "but what I mean is, where does your church get its power, for example, to hold property, to collect debts, to use distraint against the property of others, to foreclose its mortgages and to cause judgment to be executed against those who fail to pay their debts to it? You will say at once that it has these powers direct from Heaven. No doubt that is true, and no religious person would deny it. But we lawyers are compelled to take a narrower, a less elevating point of view. Are these powers conferred on you by the state legislature or by some higher authority?"

"Oh, by a Higher Authority, I hope," said the rector very fervently. Whereupon Mr Skinyer left him without further questioning, the rector's brain being evidently unfit for the subject of corporation law. On the other hand, he got satisfaction from the Reverend Dr Dumfarthing at once.

"The church of St Osoph" said the minister "is a perpetual trust holding property as such under a general law of the state and able as such to be made the object of suit or distraint. I speak with some assurance, as I had occasion to enquire into the matter at the time when I was looking

for guidance in regard to the call I had received to come here.

* * *

"It's a quite simple matter," Mr Skinyer presently reported to Mr Fyshe. "One of the churches is a perpetual trust, the other practically a state corporation. Each has full control over its property, provided nothing is done by either to infringe the purity of its doctrine."

"Just what does that mean?" asked Mr Fyshe.

"It must maintain its doctrine absolutely pure. Otherwise, if certain of its trustees remain pure and the rest do not, those who stay pure are entitled to take the whole of the property. This, I believe, happens every day in Scotland, where of course there is great eagerness to remain pure in doctrine."

"And what do you define as pure doctrine?" asked Mr Fyshe.

"If the trustees are in dispute," said Mr Skinyer, "the courts decide; but any doctrine is held to be a pure doctrine if all the trustees regard it as a pure doctrine."

"I see" said Mr Fyshe thoughtfully, "it's the same thing as what we called 'permissible policy' on the directors in the Tin Pot Combination."

"Exactly", assented Mr Skinyer, "and it means that for the merger we need nothing - I state it very frankly - except general consent."

* * *

The preliminary stages of the making of the merger followed along familiar business lines. The trustees of St Asaph's went through the process known as "approaching" the trustees of St. Osoph's....

...All of these things constituted what was called the promotion of the merger, and were almost exactly identical with the successive stages of the making of the Amalgamated Distilleries and the Associated Tin Pot Corporation; which was considered a most hopeful sign.

* * *

"Do you think they'll go into it?" asked Mr Newberry of Mr Furlong senior anxiously. "After all, what inducement have they?"

"Every inducement," said Mr Furlong. "All said and done they've only one large asset - Dr Dumfarthing. We're really offering to buy up Dr Dumfarthing by pooling our assets with theirs."

"And what does Dr Dumfarthing himself say to it?"

"Ah, there I am not so sure," said Mr Furlong; "that may be a difficulty. So far as there hasn't been a word from him, and his trustees are absolutely silent about his views. However, we shall soon know all about it. Skinyer is asking us all to come together one evening next week to draw up the articles of agreement."

"Has he got the financial basis arranged, then?"

"I believe so," said Mr Furlong. "His idea is to form a new corporation to be known as the United Church Limited or by some similar name. All the present mortgagees will be converted into unified bond-holders, the pew rents will be capitalised into preferred stock, and the common stock, drawing its dividend from the offertory, will be distributed among all members in standing. Skinyer says that it is really an ideal form of church union, one that he thinks is likely to be widely adopted. It has the advantages of removing all questions of religion, which he says are practically the only remaining obstacle to a union of all the churches. In fact, it puts the churches once and for all on a business basis." But what about the question of doctrine, of belief?" asked Mr Newberry.

"Skinyer says he can settle it," answered Mr Furlong.

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About a week after the above conversation the united trustees of St Asaph's and St Osoph's were gathered about a huge egg-shaped table in the board room of the Mausoleum Club. They were seated in intermingled fashion, after the precedent of the recent Tin Pot Amalgamation, and were smoking huge black cigars specially kept by the club for the promotion of companies, and chargeable to expenses of organisation at fifty cents a cigar. There was an air of deep peace brooding over the assembly, as among men who have accomplished a difficult and meritorious task.

"Well then" said Mr Skinyer, who was in the chair with a pile of documents in front of him, "I think that our general basis of financial union may be viewed as settled."

A murmur of assent went round the meeting.

"The terms are set forth in the memorandum before us which you have already signed. Only one point - a minor one - remains to be considered. I refer to the doctrines or the religious belief of the new amalgamation.

"Is it necessary to go into that?" asked Mr Boulder.

"Not entirely, perhaps", said Mr Skinyer, "Still there have been, as you know, certain points - I won't say of disagreement, but let us say of friendly argument - between the members of the different churches. Such things, for example," here he consulted his papers, "as the theory of the Creation, the salvation of the soul, and so forth, have been mentioned in this connection. I have a memorandum of them here though the points escape me for the moment. These, you may say, are not matters of first importance, especially as compared with the intricate financial questions which we have already settled in a satisfactory manner. Still, I think it might be well if I were permitted, with your unanimous approval, to jot down a memorandum or two to be afterwards embodied in our articles.

There was a general murmur of approval.

"Very good", said Mr Skinyer, settling himself back in his chair. "Now, first in regard to the Creation," here he looked all round the meeting in a way to command attention. "Is it your wish that we should leave that merely to a gentleman's agreement or do you want an explicit clause?" "I think it might be well," said Mr George Overend, "to leave no doubt about the theory of the Creation."

"Good", said Mr Skinyer. "I am going to put it down then something after this fashion: 'On and after, let us say, August 1st proximo, the process of the Creation shall be held, and is hereby held, to be such and such only as is acceptable to a majority of the holders of common and preferred stock, voting pro rata.' Is that agreed?"

"Carried" cried several at once.

"Carried", repeated Mr Skinyer. "Now let us pass on" - here he consulted his notes - "to item two, eternal punishment. I have made a memorandum as follows: 'Should any doubts arise, on or after August first proximo, as to the existence of eternal punishment, they shall be settled absolutely and finally by a pro rata vote of all the holders of common and preferred stock.' Is that agreed?"

"One moment!" said Mr Fyshe. "Do you think that quite fair to the bondholders? After all, as the virtual holders of the property, they are the

persons most interested. I should like to amend your clause and make it read - I am not phrasing it exactly but merely giving the sense of it - that eternal punishment should be reserved for the mortgagees and bond-holders."

At this there was an outbreak of mingled approval and dissent, several persons speaking at once. In the opinion of some, the stock-holders of the company, especially the preferred stock-holders, had as good a right to eternal punishment as the bond-holders. Presently Mr Skinnyer, who had been busily writing notes, held up his hand for silence.

"Gentlemen", he said, "will you accept this as a compromise? We will keep the original clause but merely add to it the words, 'But no form of eternal punishment shall be declared valid if displeasing to a three-fifths majority of the holders of bonds.'"

"Carried, carried," cried everybody.

"To which I think we need only add," said Mr Skinnyer "a clause to the effect that all other points of doctrine, belief, or religious principle may be freely altered, amended, reversed, or entirely abolished at any general annual meeting."

There was a renewed chorus of, "Carried, carried", and the trustees rose from the table shaking hands with one another, and lighting fresh cigars as they passed out of the club into the night air....

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Thus was constituted the famous union or merger of the churches of St Asaph and St Osoph, viewed by many of those who made it as the beginning of a new era in the history of the modern Church. There is no doubt that it has been in every way an eminent success.

Rivalry, competition, and controversies over points of dogma have become unknown on Plutoria Avenue. The parishoners of the two churches may now attend either of them just as they like. As the trustees are fond of explaining, it doesn't make the slightest difference. The entire receipts of the churches, being now pooled, are divided without reference to individual attendance. At each half-year there is issued a printed statement which is addressed to the shareholders of the United Churches, Limited, and is hardly to be distinguished in style or material from the annual and semi-annual reports of the Tin Pot Amalgamation and the United Hardware and other quasi-religious bodies of the sort. "Your directors," the last of these documents states, "are happy to inform you that, in spite of the prevailing industrial depression, the gross receipts of the corporation have shown such an increase as to justify the distribution of a stock dividend of special Offertory Stock Cumulative, which will be offered at par to all holders of common or preferred shares....