

## HOME IN AUSTRALIA: MEANING, VALUES AND LAW?

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*This article argues for an expansive understanding of home as an experience, and so pushes beyond the traditional bounds of (home)ownership – either freehold or leasehold ownership – as restricted to house. Home – the desired experience motivating the article – is a feeling of security, self-expression, and relationships and family. Laws, it is argued, must embody certain conditions for individuals to experience home in this way, and these are discussed. Overall, the article's contribution is to encourage future legal research into whether specific Australian laws are perpetuating an inferior experience of home for some individuals because they undermine conditions for home set out herein. However, the article recognises that home is a challenging concept. As such, an important qualification is that the arguments presented about what home is, and the conditions under which it is achieved, are informed but not definitive. The subjective experience of home will likely differ between individuals. That said, the discussion of home in this article has ample support in the literature.*

‘Home is the landscape of the heart’ – Unknown

### I INTRODUCTION

This article on home is divided into five parts. Part I is this Introduction. Part II explores the meaning of home in the housing context. It articulates an understanding of what home ideally entails in that context,<sup>1</sup> and so pushes

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1 Drawing particularly on UK academic Fox O'Mahony's conceptualisation of home. Fox O'Mahony conceptualises home through five 'value-types': home as a financial investment; home as a physical structure; home as territory; home as a centre for self-identity; and home as a social and cultural unit: Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007) 146. Other conceptualisations of home also exist. See, eg, 'the personal aspects of home; the social aspects of home;

beyond the traditional bounds of (home)ownership – either freehold or leasehold ownership – as restricted to house. Home is different to house. Home is an experience.<sup>2</sup> ‘Home’ in this article refers to the home experience, whereas ‘house’ (or ‘dwelling’) refers to a place, ie, the physical shelter. The home experience, ideally, entails three dimensions: (a) the feeling of security; (b) the expression of self-identity; and (c) relationships and family. These three dimensions are explained, relying on selected home literature. The three dimensions are necessary to human flourishing and a part of humanness.<sup>3</sup> Part III explores conditions necessary – in law – for the experience of home through house, and which could be used to reform laws – as appropriate – to expand existing ownership interests to better encompass home, and under both leasehold and freehold tenure.<sup>4</sup> A house is necessary for home. However, it alone is not enough for home experienced as security, self-identity, and relationships and family. More is needed, including laws that ensure conditions conducive to home. Research clearly supports the view that permanence is necessary to home. Extrapolating from this, housing *stability* – the state of being able to remain in current housing – is a very important condition for home. Individuals who perceive stability in their housing situation are empowered to experience home. Conversely, individuals who perceive an unstable and interim housing situation

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and the physical aspects of home’: Judith Sixsmith, ‘The Meaning of Home: An Exploratory Study of Environmental Experience’ (1986) 6(4) *Journal of Environmental Psychology* 281, 289.

- 2 Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (2002) 29(4) *Journal of Law and Society* 580, 607: ‘[A]s an ultimately experiential phenomenon, [the concept of home] is difficult to prove’. Home has also been referred to as ‘part of the experience of dwelling – something we do, a way of weaving up a life in particular geographic spaces’: Susan Saegert, ‘The Role of Housing in the Experience of Dwelling’ in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 287, 287. See also Kimberly Dovey, ‘Home and Homelessness’ in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 33, 34.
- 3 On human flourishing in property theory, see especially Gregory S Alexander, ‘The Social-Obligation Norm in American Property Law’ (2009) 94(4) *Cornell Law Review* 745; Gregory S Alexander, ‘Ownership and Obligations: The Human Flourishing Theory of Property’ (Paper No 653, Cornell Law Faculty Publications, 1 January 2013) 1; Gregory S Alexander et al, ‘A Statement of Progressive Property’ (2009) 94(4) *Cornell Law Review* 743. Also, see generally Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012).
- 4 Leasehold and freehold tenure are, broadly speaking, the two housing tenures which exist in Australia: see Kath Hulse, ‘Shaky Foundations: Moving Beyond “Housing Tenure”’ (2008) 25(3) *Housing, Theory and Society* 202, 210. ‘[T]here are basically only two types of housing tenure in modern societies – owner occupation and renting – which are distinguished by qualitatively different modes of possession of housing as indicated by the rights of disposal, of use (particularly security) and of control (eg, in altering the dwelling)’ at 204–5. However, within freehold and leasehold tenure there are different forms of each. These different forms offer different levels of control and stability to occupiers, and so varying experiences of home. An example of a particular form of freehold tenure is strata title, a unique feature of which is the sharing of common property between all lot owners. The strata title lot owners’ rights of control are thus limited in that regard: see especially Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-owned Properties* (Routledge, 2017). An example of a particular form of leasehold tenure is a protected tenancy, a unique feature of which is the tenant’s (effectively) indefinite duration of tenure under statute: see below Part III for discussion of protected tenancies. Varying experiences of home are the result of different legal rights under such different tenure forms.

are at risk of ‘homelessness’.<sup>5</sup> Another very important condition for home is housing control – the ability to exert control over one’s living space, for example, through improvements and modifications. Such housing control is particularly important so that individuals can express their identity through making changes to a house.<sup>6</sup> Both conditions – housing stability and housing control – are often adversely impacted by laws. Other conditions for home are also briefly described so as to demonstrate the complexity of home as a phenomenon, turning on many variables and conditions. Other conditions are, in many cases, outside the control of law and so it follows that laws cannot guarantee to individuals that they will experience home. Laws can, however, go a long way to foster that home experience, and thus to expand (home)ownership to clearly include home as an experience.

Part IV explores the relevance of tenure type – leasehold or freehold ownership – to the experience of home.<sup>7</sup> This article argues strongly that tenure type is not, and should not, be a condition for home. Rather, this article argues that all occupiers – under leasehold or freehold ownership – are, theoretically speaking, capable of experiencing home. Nothing inherent exists in the nature of each tenure which precludes housing stability, or housing control, and hence home. Home need not, therefore, and conceptually speaking, be experienced in an *overly* discriminatory way between the tenure types. Given this, and as a matter of policy, Australian laws should be directed towards enhancing home under both tenures by improving housing stability and housing control under both. That said, and notwithstanding that home can – conceptually speaking – be realised under both tenures, the clear reality of existing Australian laws is that home is rarely experienced equally by occupiers under different forms of tenure.<sup>8</sup> Australian laws have produced differences between the tenures, such that freehold ownership of the fee simple absolute estate (referred to as ‘freehold ownership’ in this article)<sup>9</sup> has characteristics which might enhance stability and

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5 ‘Homelessness’ is understood here as a lack of the experience of home. This is different from ‘rooflessness’, which is, more narrowly, the lack of physical shelter: see Peter Somerville, ‘Homelessness and the Meaning of Home: Rooflessness or Rootlessness?’ (1992) 16(4) *International Journal of Urban and Regional Research* 529, 531.

6 Hazel Easthope, ‘Making a Rental Property Home’ (2014) 29(5) *Housing Studies* 579, 593: ‘This paper has argued that the ability of tenants to personalise their rental property and make it a home is affected by their security of occupancy and their power to make changes to their dwelling. In Australia, insufficient attention has been given to the impact of a lack of control over one’s dwelling on the well-being of renters among legislators and policy-makers’. ‘Also important in regard to the framing of a valued identity and lifestyle is the ability of individuals to influence the quality and attributes of their dwellings. Indeed, many studies in the field of environmental psychology have pointed to the contribution of personalising physical space towards psychological well-being’: at 582 (citations omitted).

7 The link between tenure type and the experience of home is the subject of much research, oftentimes conflicting: see Bronwyn Bate, ‘Understanding the Influence Tenure Has on Meanings of Home and Homemaking Practices’ (2018) 12(1) *Geography Compass* 1.

8 See above n 4.

9 While, as noted, ‘freehold ownership’ is used in this article as shorthand for the fee simple absolute estate, there are other forms of freehold ownership – for example, the freehold life estate which ends on the death of the interest holder (unlike the fee simple absolute estate which continues forever or until devised to another). The fee simple estate is ‘the greatest interest in land recognised by the common law’:

control, and therefore be more conducive to home.<sup>10</sup> Freehold owners, for example, enjoy an indefinite duration of tenure, unlike most Australian occupiers under leasehold ownership.<sup>11</sup> This means that freehold owners will usually experience more housing stability and hence security. Freehold ownership will likely remain – legitimately on this basis – the preferred tenure of many;<sup>12</sup> and for home, and not only profit, purposes.<sup>13</sup> Australian laws should, therefore, assist home owners to retain their homes on this basis and as a matter of policy. Australian laws should also facilitate first home ownership for as many as possible. That is not happening currently. Laws exist which (instead) facilitate housing acquisition for investment purposes. Tax concessions given, by the state, to residential property investors, artificially create additional demand for housing, and so rapid price growth.<sup>14</sup> This rapid price growth precludes home ownership – including of the (potentially superior) home experience associated

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Brendan Edgeworth et al, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2013) 179–80 [3.12].

- 10 This addresses one of the more polarising questions in the home literature: does freehold ownership enable ‘greater scope’ for home than leasehold ownership? On this, see Peter Saunders, *A Nation of Home Owners* (Unwin Hyman, 1990) 274: ‘Does this mean that ownership can provide a sense of personal security, identity and autonomy which may be denied to non-owners? Put another way, does private ownership generate greater scope for the expression of self and identity in a private realm?’
- 11 Ibid 98–9:

Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense they are normally recognized as a necessary component to any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.
- 12 Ibid 98: ‘Because owners enjoy a different set of rights from those enjoyed by tenants, it follows that people may well aspire to one tenure rather than the other simply because they want rights, such as the right of disposal, which are guaranteed by one but not the other’. See also Jill Sheppard, Matthew Gray and Ben Phillips, ‘Attitudes to Housing Affordability: Pressures, Problems and Solutions’ (Report No 24, Australian National University College of Arts and Social Sciences, May 2017) 4: ‘In March 2017, this ANUpoll surveyed 2,513 Australians on a range of issues regarding housing affordability, decisions to buy or rent, motivations to purchase investment property, and support for different policies to improve housing affordability’. A relevant finding is that ‘[t]hree quarters of Australians believe homeownership is a large part of the “Australian way of life”’. Another relevant finding is that ‘Australians are just as likely to buy housing for non-financial reasons (such as emotional security, stability, and belonging) as financial reasons (such as investment or financial security)’; at 4.
- 13 Sheppard, Gray and Phillips (n 12) 4.
- 14 Senate Select Committee on Housing Affordability in Australia, Parliament of Australia, *A Good House Is Hard to Find: Housing Affordability in Australia* (Report, June 2008) 59: ‘This speculative demand for housing may be encouraged by some aspects of the taxation system, which makes investing in housing (and sometimes other assets yielding capital gains) more attractive than alternative investments’. For further commentary, see Hazel Blunden, ‘Discourses around Negative Gearing of Investment Properties in Australia’ (2016) 31(3) *Housing Studies* 340; Jim O’Donnell, ‘Quarantining Interest Deductions for Negatively Gearing Rental Property Investments’ (2005) 3(1) *eJournal of Tax Research* 63; Richard Krever, ‘Law Reform and Property Interests: Attacking the Highly Geared Rental Property Loophole’ (1985) 10(5) *Legal Service Bulletin* 234; Rami Hanegbi, ‘Negative Gearing: Future Directions’ (2002) 7(2) *Deakin Law Review* 349; Jane Trethewey, ‘Taxation Aspects of Real Estate Transactions: Part 1’ (1994) 29(5) *Taxation in Australia* 239.

with freehold ownership – for many people,<sup>15</sup> especially younger Australians. While tax laws are not the focus of this article, they are referenced here because of their significant impact, precluding freehold ownership for many – and with it, the potentially superior home experience associated with that tenure. A second critical policy implication is that leasehold owners should also be assisted to experience home, including through appropriate legal change. Reforms to residential tenancy legislation in New South Wales and Victoria demonstrate that legal change can be necessary for leasehold owners (ie, tenants) to experience home.<sup>16</sup> Use of the term ‘leasehold owners’ (and the corresponding ‘leasehold ownership’) throughout this article, rather than the more commonly used ‘tenant’ (and ‘residential tenancy’), is to emphasise the significance of leasehold as the basis for many people’s home experience, and to overcome any cultural perception that leasehold is an inferior tenure by default.

To reiterate, this article should be understood as arguing for an expansive understanding of home, which pushes beyond the traditional bounds of (home)ownership – either under leasehold or freehold tenure – as restricted to house.<sup>17</sup> Overall, the article’s contribution is to encourage future legal research into whether Australian laws are perpetuating an inferior experience of home for some individuals because they undermine the conditions for home set out herein.<sup>18</sup> The article itself does not evaluate specific Australian laws, but, rather, is an introduction to home to stimulate that kind of scholarship in Australia.

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- 15 Sheppard, Gray and Phillips (n 12) 12: ‘Among Australians not currently in the housing market, 68 per cent are concerned about being able to afford to buy a home. Almost 40 per cent cannot currently afford to buy, while another 20 per cent of Australians do not think they will ever be able to afford to buy’.
  - 16 The Victorian and New South Wales Parliaments have recently passed reforms to those states’ residential tenancy laws: see *Residential Tenancies Amendment Act 2018* (Vic) and *Residential Tenancies Amendment (Review) Act 2018* (NSW). Victoria, particularly, passed over 130 reforms under the *Residential Tenancies Amendment Act 2018* (Vic).
  - 17 Implied by this view is a new conceptualisation that home – the experience – ought to form part of property. That will be explored in a separate article on home and property theory and is beyond the scope of this article because it concerns normative claims about the nature and purpose of property. In that regard, see, eg, Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011); Alexander, ‘The Social-Obligation Norm in American Property Law’ (n 3); Alexander, ‘Ownership and Obligations: The Human Flourishing Theory of Property’ (n 3); Alexander et al, ‘A Statement of Progressive Property’ (n 3); Alexander and Peñalver, *An Introduction to Property Theory* (n 3); Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge-Cavendish, 2007); Margaret Jane Radin, ‘Property and Personhood’ (1982) 34(5) *Stanford Law Review* 957.
  - 18 Such home scholarship on particular areas of Australian law is scarce. However, that is not to say that home scholarship in law is absent in Australia. See especially Margaret Davies, ‘Home and State: Reflections on Metaphor and Practice’ (2014) 23(2) *Griffith Law Review* 153. Davies makes the case that certain understandings of ‘home’ used in reference to the state (‘the home-state dyad’) have obscured the dispossession of Indigenous peoples: at 163. ‘In its uncritical and idealised form, it [home] can be a highly problematic concept, which obscures violence and disempowerment’: at 161. ‘It is for these reasons that contemporary Australia needs to confront, in a critical and dialogical way, the home-state connection. Clearly this cannot be based on a simplistic jingoistic adoption of “Australia” as “home”, or on a denial of the relevance of dispossession of Aboriginal homeland. Any critical understanding of the Australian state must be based on the acknowledgement that the state was, and is, and will remain, built on dispossession’: at 171–2. Separately, as Fox O’Mahony’s work makes clear, understanding the concept of home allows research in law to properly engage with home, including the experience. See further Lorna Fox O’Mahony and James A Sweeney, ‘The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse’ (2010) 37(2) *Journal of Law and Society* 285.

Throughout the article, reliance is placed on Fox O'Mahony's seminal home scholarship in law. Fox O'Mahony has comprehensively reviewed the social sciences literature on the meaning of home for occupiers, and elaborated on its implications for law. The reliance on that work in this article is thus worthwhile in terms of prompting consideration of its relevance to Australian legal scholarship and the Australian home. However, this article recognises that home is a challenging concept. As such, an important qualification is that the arguments presented about what home is, and the conditions under which it is achieved, are informed but not definitive. The subjective experience of home will likely differ between individuals. That said, the discussion of home in this article has ample support in the literature.

## II MEANING OF HOME

The meaning of home is most easily understood in contradistinction to house, which describes something entirely different.<sup>19</sup> This part, accordingly, explores the meaning of home by (first) defining house, and (second) distinguishing it from home – the experience.

### A House v Home

House describes the tangible structure – the building – which affords occupants 'crucial physical shelter'<sup>20</sup> and the 'physical amenities that sustain and support the residents'.<sup>21</sup> Houses are where 'families establish, grow, and bond themselves into a unit' and 'to the larger society'.<sup>22</sup> When the physical structure is lost there is "'houselessness'", which is often referred to as homelessness'.<sup>23</sup> The physical asset of house also provides financial security.<sup>24</sup> In this regard, houses provide 'low cost' housing later in life, 'inheritance' for family,<sup>25</sup> and can

19 The distinction between house and home is widely accepted by home scholars, across disciplines. 'One issue, on which there appears to be a broad consensus, is that *home* cannot be equated with *house*': Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 178 (emphasis in original).

20 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 591. See also Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 23–4: '*home as a physical structure*, which offers material shelter, a roof over one's head' (emphasis in original).

21 Irwin Altman and Carol M Werner, 'Introduction' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) xix, xix.

22 Ibid.

23 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 591 (emphasis in original). 'Homelessness' is taken, in this article, to have a much broader meaning than lack of a house: see discussion below in Part II(D), under 'Experience of Homelessness'.

24 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 24 (emphasis in original): '*home as a financial investment*, which reflects the importance of the home as a financial asset for the owner(s)'.

25 Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 159. See also Susan Bright and Nicholas Hopkins, 'Home, Meaning and Identity: Learning from the English Model of Shared Ownership' (2011) 28(4) *Housing, Theory and Society* 377, 380: '[I]n particular home ownership carries prospects of owning an asset appreciating in value over time and provides security'.

also be ‘used as collateral for other borrowing’.<sup>26</sup> House is thus a financial investment.<sup>27</sup> This is why housing is widely seen as ‘a commodity or an investment opportunity, something to be bought and sold with an eye to profit as well as use’.<sup>28</sup> Housing is, in this financial sense, becoming increasingly important. Housing ownership is increasingly a vehicle to accumulate wealth, where previously the labour market mainly determined economic wealth, according to Saunders.<sup>29</sup>

However, the financial benefits of housing generally only accrue to the freehold owner. Saunders explains that ownership allows individuals to ‘accumulate wealth in a way that tenants cannot’.<sup>30</sup> The freehold owner can realise the monetary value of a house through its sale. The freehold owner can also borrow against the asset, thereby obtaining loan funds. Leasehold owners of residential property in Australia generally cannot do these things because the relatively short duration of their leases means they are not considered of value and hence tradeable for financial gain by the market.<sup>31</sup> Further, their rights to trade (ie, dispose) of their leases are curtailed by their lease terms.<sup>32</sup> Leasehold owners in Australia thus derive physical shelter from house but not generally the same financial benefits which freehold owners enjoy. House as a financial investment is thus ‘the domain where the clearest blue water lies between the meanings of home across tenures’.<sup>33</sup> Of course, exceptions arise whereby leasehold owners are readily able to assign (ie, sell for financial gain) or borrow against their lease due to a much longer duration of tenure, as, for example, with the leases of certain residential apartments in Sydney, New South Wales, at Barangaroo, Walsh Bay and Woolloomooloo Finger Wharf. The relevance of tenure type is considered further in Part IV below.

Home, in contradistinction to house, is the *experience* individuals have in a house; it is an ‘experiential phenomenon’.<sup>34</sup> Home is, however, related to house<sup>35</sup>

26 Bright and Hopkins (n 25) 385, citing Susan J Smith, Beverley A Searle and Nicole Cook, ‘Rethinking the Risks of Home Ownership’ (2009) 38(1) *Journal of Social Policy* 83.

27 Home as a financial investment is a recent phenomenon. See Fox O’Mahony (n 25) 159–60: ‘The growth of the homeownership sector, particularly from the 1980s, combined with a rapid rise in the value of housing as an asset emphasised the potential meanings of home as a financial asset to be accumulated and passed on to future generations as inheritance’.

28 Robert M Rakoff, ‘Ideology in Everyday Life: The Meaning of the House’ (1977) 7(1) *Politics & Society* 85, 93.

29 Saunders (n 10) 122.

30 Ibid.

31 Comments here are with respect to leasehold owners of residential property in Australia. Other leasehold owners, for example of commercial property, are typically not subject to the same restrictions and hence might be able to dispose of their lease asset (or borrow against it) for financial gain.

32 The standard form of residential tenancy agreement used in Victoria, for example, provides: ‘The tenant must not assign or sub-let the whole or any part of the premises without written consent of the landlord. The landlord’s written consent must not be unreasonably withheld’: *Residential Tenancies Regulations 2019* (Vic) reg 8, sch 1 form 1.

33 Fox O’Mahony (n 25) 159.

34 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 607: ‘as an ultimately experiential phenomenon, is difficult to prove’. See also Dovey (n 2) 34; Saegert (n 2) 287. Home is referred to as ‘part of the experience of dwelling – something we do, a way of weaving up a life in particular geographic spaces’: at Saegert (n 2) 287.

because house is ‘the locus for the experience of home’.<sup>36</sup> House, in other words, is the place where home – the experience – occurs. This interrelationship between house and home is encapsulated in the following formula: *home* = house + x.<sup>37</sup> House is the physical structure providing shelter and financial security; the ‘tangible’ aspects of house described above.<sup>38</sup> The ‘x factor’ is the experience of home; the ‘less tangible’.<sup>39</sup> House, and the ‘x factor’ experiences, are both necessary to make home. However, as the formula makes clear, unravelling ‘the enigmatic “x factor”’ – the experience of home – is the ‘conceptual challenge’.<sup>40</sup>

The experience of home – and its great significance for individuals – is vividly demonstrated in the popular 1997 Australian film, *The Castle*. The fictional Kerrigan family – the main protagonists – love their home and all it entails. However, the local airport seeks to expand and compulsorily acquire their house. But this house is where the Kerrigans experience home and, accordingly, the loss of home looms large for them throughout the film. Daryl Kerrigan, the father, takes their claim about home ‘all the way to the High Court’. He tells the judges: ‘It’s not a house, it’s a home. People who love each other. Memories. Family’.<sup>41</sup> Kerrigan is here describing an experience of home which, although it requires the house, is different and portrayed as more precious, particularly considering that no monetary compensation can replace this home experience. This film continues to resonate with a large cross-section of Australian society. It has become an Australian classic. Many people, it seems, relate to the Kerrigans’ connection to home and so can understand the destructive consequences flowing from its loss: most obviously, the loss of physical shelter, but also of cherished experiences in the form of memories, family, identity and security.

While home, for the Kerrigans, meant ‘people’, ‘love’, ‘memories’ and ‘family’, this will not universally be the case. Not everyone will have the same home experience.<sup>42</sup> Some people might, in fact, have a negative home experience.

35 Although, as Fox O’Mahony notes: ‘For home scholarship, the home as a possession is not distinguished, or necessarily distinguishable from the social relations that are housed within it; no more than the meanings or experience of home can in reality be fractioned into discrete elements of shelter, investment, identity and so on’: Fox O’Mahony (n 25) 164.

36 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 590.

37 Ibid; Amos Rapoport, ‘A Critical Look at the Concept “Home”’ in David N Benjamin and David Stea (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury Publishing, 1995) 29 (emphasis in original): ‘One other way of thinking about what the use of *home* (as opposed to *house*) is meant to communicate (and one to which I will return) is that possibly *home* = *house* + x. If that is the case, one can ask what that “x” might be that makes a home more than a house’.

38 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 591–2.

39 Ibid.

40 Ibid 590.

41 *The Castle* (Village Roadshow, 1997), cited in Nicole Graham, *Landscape: Property, Environment, Law* (Routledge-Cavendish, 2010) 11; Paul T Babie, Peter D Burdon and Francesca da Rimini, ‘The Idea of Property: An Introductory Empirical Assessment’ (2018) 40(3) *Houston Journal of International Law* 797, 799.

42 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 179: “‘Home’ is a fluid concept, which may embrace some or all of these meanings to a particular occupier. “Home” means different things to different people’.

Feminist scholars, for example, critique the positive connotations of home in their application to women.<sup>43</sup> Home is subjective in this way.<sup>44</sup> Home will, as such, always be ‘a difficult concept to pin down’<sup>45</sup> and, at least to some extent, it will always remain an ‘elusive notion’.<sup>46</sup> Dovey comments that ‘understanding in this area is plagued by a lack of verifiability that many will find frustrating’.<sup>47</sup> This presents difficulty for any future legal research which is concerned with the experience of home,<sup>48</sup> and how it is affected by laws.

The particular conundrum is thus: how can appropriate laws be developed to protect home when the home experience is itself contestable?<sup>49</sup> Acknowledging this conundrum, the article suggests legal research on home will always be contestable on the basis that home is contestable. Laws that some argue are conducive (or not) to home might, for example, be irrelevant to what another individual believes and experiences regarding home. However, this is no reason to altogether avoid home scholarship in Australian law, which this article seeks to encourage.<sup>50</sup> Home is a significant experience for individuals,<sup>51</sup> integral to their flourishing, and so it is important to know which laws enhance it or do not. Real property laws, particularly, are directly implicated in this home experience.<sup>52</sup> They impact individuals’ relationship with their house and this relationship is a critical part of home.<sup>53</sup>

Particular questions researchers might ask are: What does Australian society need or want in terms of home? And how must laws change in response and to ensure home? These questions necessarily involve looking at the relationship between law and society, and it is worth pointing out that the law has typically

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- 43 See discussion in Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 593–4. See also Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 366; Carole Després, ‘The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development’ (1991) 8(2) *Journal of Architectural and Planning Research* 96, 106. For a different perspective, see Saunders (n 10) 312: ‘There is, quite simply, no evidence to support feminist claims that women experience the home as oppressive or that notions of the home as haven are a male myth’.
- 44 Home is ‘a complex, ambiguous concept that generates contention’ and which ‘transcends quantitative, measurable dimensions’ to include ‘subjective ones’: Roderick J Lawrence, ‘Deciphering Home: An Integrative Historical Perspective’ in David N Benjamin and David Stea (eds), *The Home: Words, Interpretations, Meanings and Environments* (Avebury Publishing, 1995) 58.
- 45 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 607.
- 46 Saegert (n 2) 287.
- 47 Dovey (n 2) 34.
- 48 Traditionally, law values certainty, rationality and objectivity. These ‘present obvious impediments’ to developing ‘home’ in law: Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 580–1.
- 49 Ibid. Fox identifies such subjectivity as among the reasons the law lacks a clear understanding of home.
- 50 As per Fox O’Mahony’s work, see above nn 1–2, 25.
- 51 Fox O’Mahony (n 25) 158.
- 52 Symes and Gray capture the overall point. See KJ Gray and PD Symes, *Real Property and Real People: Principles of Land Law* (Butterworths, 1981) 4, cited in Fox O’Mahony (n 25) 157: ‘All of us – even the truly homeless – live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter. In this way land law impinges upon a vast area of social orderings and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people’.
- 53 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 139; Fox O’Mahony (n 25) 157: focus on this relationship ‘sets “home” studies apart from property or land law, on the one hand, and even to some extent from housing, with its emphasis on provision, on the other’.

evolved in response to society's needs. Further, the very concept of property itself has evolved over time, as required.<sup>54</sup> Law, therefore, it is suggested, must take account of the needs of society (of which home is one)<sup>55</sup> because law exists to serve society. However, before researchers can consider areas of Australian law where improvements could be made to realise home, it is first necessary to understand the experience of home.

Extensive research on home in disciplines other than law yields common understandings of the experience of home.<sup>56</sup> This makes it possible to develop an understanding of home, reflecting the desires which many occupiers have for home. It is to these the article now turns, providing an introduction to home for Australian legal scholars, to encourage legal research in this area.

## B Experience of Home

Drawing on Fox O'Mahony's work – particularly her review of the extensive social sciences literature on home, on which this article also relies – this article understands the experience of home, ideally, to entail: (a) the feeling of security; (b) the expression of self-identity; and (c) relationships and family. This understanding of home finds support in existing social sciences research and also reflects the experience of home which this article hopes all individuals can experience in the housing context.

### 1 *Feeling of Security*

Home is a feeling of security.<sup>57</sup> Homes can make individuals feel secure. Security was among the needs found to be fulfilled by home in interviews with

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54 See, eg, Charles A Reich, 'The New Property' (1964) 73(5) *The Yale Law Journal* 733. Reich famously identified that the nature of property had changed.

55 On socio-legal research, see Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing, Oregon, 2011) 34–5:

Many different approaches and perspectives on legal research come under the socio-legal umbrella, but in essence, as the name implies, socio-legal research situates laws and legal analysis in a social (some would say societal) context. In contrast with black letter analysis, the socio-legal approach looks beyond legal doctrine to understand law as a social phenomenon or type of social experience. Socio-legal scholars often characterise their approach as the difference between 'law in books' and 'law in action'. Socio-legal research was first carried out in the criminal justice field, but these days it is being conducted in all areas of law. Socio-legal research can uncover and expose the (previously unquestioned) political nature of laws, show whether laws have achieved their intended effect, assist in law reform proposals by linking law and policy goals, and reveal how law actually operates in practice by shedding light on the experiences of different groups who come into contact with the law.

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By its nature, socio-legal research is inter-disciplinary, drawing on the tools and insights of disciplines such as sociology, social policy, anthropology, criminology, gender studies, ethics, economics and politics to explain and critique law and legal practices. Socio-legal research may also be theoretical, attempting to provide a social theory of law, asking what role does law play in society, or examining law as a form of power or a social systems or a cultural practice.

56 See generally Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1).

57 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 24: '[H]ome as a territory, which offers security and control, a locus in space, permanency, continuity and privacy' (emphasis in original); Dovey (n 2) 46, citing Kimberly Dovey, 'Home: An Ordering Principle in Space' (1978) 22(2) *Landscape* 27–

occupiers conducted by Sebba and Churchman.<sup>58</sup> Interestingly, feeling secure was referred to 'more often by younger children than by parents or older children'.<sup>59</sup> This suggests children will be most impacted when home fails to provide security. Feelings of security, experienced by the occupiers in this study, were influenced by permanence in housing. Security was 'not a function of physical shelter but of permanency in the home', that is, 'the knowledge that nobody can force them [occupiers] to leave'.<sup>60</sup> Having a house, it seems, is not enough for the feeling of security. Housing permanence is needed too. The feeling of security, additionally, depends on occupiers having control of the home space.<sup>61</sup> This makes sense intuitively; feelings of security are unlikely to manifest in living spaces individuals do not control.

Fitchen's study also connects home with security. Interviewees included residents exposed to contamination in the home environment. Contamination was, in their view, 'a major breach of security in the broader sense: the home had proven unable to provide the protection it was supposed to'.<sup>62</sup> Particularly,

parents expressed a sense of guilt for having failed to provide a fully protective home for their children ... To feel that one's children are not safe within one's own home appeared to create extra anxiety precisely because the home is supposed to be a place of security and protection.<sup>63</sup>

It was not just residents whose homes were contaminated who identified home with security. Fitchen explains:

This protective aspect of home was further explored in a supplementary research probe among populations who had not yet experienced residential contamination. In completing the sentence, 'Home is a place where ...' the second most common answer (a close second after 'family') referred to security, safety, and shutting out or retreating from the cares of the world (107 responses out of about 600). As one respondent (male, age 27) phrased it, 'Home is a place where ... I can live with peace of mind, and without the relative risk of harm from my surroundings to myself or my family'. One respondent wrote, 'safety and security are the main priorities'. Many wrote variants of 'It is my safe place' 'where I have a haven against the elements' and 'where you feel safe'. While the world outside may be full of crime, disease, and pollution, the assumption is that at home one is or should be safe from these evils – and hence, the discovery of toxics within the home may cause a diffuse sense of insecurity and anxiety.<sup>64</sup>

These studies were conducted with occupiers outside of Australia. However, it appears that Australian occupiers also associate their homes with security. The

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30: 'Home is a place of security within an insecure world, a place of certainty within doubt, a familiar place in a strange world, a sacred place in a profane world'.

58 Rachel Sebba and Arza Churchman, 'The Uniqueness of the Home' (1986) 3(1) *Architecture & Behaviour* 7, 8–9. See also Janet M Fitchen, 'When Toxic Chemicals Pollute Residential Environments: The Cultural Meanings of Home and Homeownership' (1989) 48(4) *Human Organization* 313, 316.

59 Sebba and Churchman (n 58) 9.

60 Ibid 9. See also Fox O'Mahony (n 25) 162: 'Through its familiarity, home can foster a sense of belonging, "rootedness", continuity, stability and permanence. Many of these values are linked to the idea that the occupier who enjoys the home as territory has a satisfactory degree of control over their home territory'.

61 Sebba and Churchman (n 58) 10: '[C]ontrol is a condition ... for a feeling of security'.

62 Fitchen (n 58) 316.

63 Ibid.

64 Ibid.

Australian National University, in a recent survey, explored with Australians why they sought home ownership. The finding: ‘Overwhelmingly, “emotional security, stability and belonging” is the most common reason for homeownership in Australia’.<sup>65</sup>

Feeling secure is a beneficial part of home. Not only is security desirable, it is also important to psychological wellbeing.<sup>66</sup> Individuals seem, intuitively, to recognise this when they seek out more secure housing situations, and, anecdotally, it can be observed that this can coincide with the time of having children. One possible explanation for this is that people recognise that security is necessary for their future children’s functioning and wellbeing. Scholars describe the various psychological needs met through security. Porteous, an expert on the destruction of home from the geography discipline, explains that home can satisfy needs for ‘identity, security, and stimulation’.<sup>67</sup> Smith and Sixsmith, both from the field of environmental psychology, separately reach similar conclusions. Smith explains ‘[w]hen individuals control space and have privacy needs met, feelings of comfort and freedom are possible. This freedom implies being able to relax and do as one wishes’.<sup>68</sup> Sixsmith explains home ‘as a profound centre of meaning and a central emotional and sometimes physical reference point in a person’s life which is encapsulated in feelings of security, happiness and belonging’.<sup>69</sup>

Psychological benefits of security in home are also attested to by occupiers. ‘It’s [home] crucial to the stability of the individual ... Coming from a stable environment makes dealing with the chaos of the external world easier’, said an occupier, from a study by Rakoff.<sup>70</sup> Home, for this occupier, makes it easier to function in the world.<sup>71</sup> ‘You feel as if you’re part of the place and its part of you – you aren’t a stranger or anything. It’s part of your history. It’s comfortable. I’m relaxed, I feel relaxed in it because, I suppose, I’m familiar with it all and, I know what to expect,’ said an occupier from Sixsmith’s study.<sup>72</sup> Their association of home with comfort and relaxation is palpable.<sup>73</sup>

Another particularly interesting example of home responding to psychological, and other, needs is seen in the ‘Housing First’ response to homelessness.<sup>74</sup> The Mercy Foundation explains this increasingly accepted policy

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65 Sheppard, Gray and Phillips (n 12) 6.

66 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 593.

67 J Douglas Porteous, ‘Home: The Territorial Core’ (1976) 66(4) *Geographical Review* 383, 383.

68 Sandy G Smith, ‘The Essential Qualities of a Home’ (1994) 14(1) *Journal of Environmental Psychology* 31, 32.

69 Judith Sixsmith, ‘The Meaning of Home: An Exploratory Study of Environmental Experience’ (1986) 6(4) *Journal of Environmental Psychology* 281, 290.

70 Rakoff (n 28) 95.

71 Ibid.

72 Sixsmith (n 69) 290.

73 Ibid.

74 On the Housing First model, see generally Sam Tsemberis, *Housing First: The Pathways Model to End Homelessness for People with Mental Health and Substance Use Disorders* (Hazelton Publishing, 2<sup>nd</sup> ed, 2015).

response: ‘Housing First is based on the idea that people need a stable and secure home before anything else (and these are only examples) such as better living or financial skills, employment, community connections or better health care is possible’.<sup>75</sup> The rationale appears to be that provision of housing can address complex needs, including the psychological need for security that, precisely because they were not being met in the first place, might have contributed to homelessness. This approach is supported by clear evidence. Research shows, for example, that through housing, individuals experiencing homelessness gain a feeling of security.<sup>76</sup> Other benefits include ‘health and wellbeing’ and ‘social integration’.<sup>77</sup>

‘Ontological security’ is closely linked to the feeling of security of home under discussion here.<sup>78</sup> Accordingly, it would be remiss not to include a brief word about it, although ‘ontological security’ is a much broader concept. At a basic level, ‘ontological security is a sense of confidence and trust in the world as it appears to be. It is a security of being’.<sup>79</sup> The individual develops ontological security through a belief in their own survival or, as Giddens puts it, in ‘the continuity of their self identity and in the constancy of their social and material environments’.<sup>80</sup>

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75 ‘Housing First’, *Mercy Foundation* (Web Page) <<https://www.mercyfoundation.com.au/our-focus/ending-homelessness-2/housing-first/>>.

76 Deborah K Padgett, ‘There’s No Place Like (a) Home: Ontological Security among Persons with Serious Mental Illness in the United States’ (2007) 64(9) *Social Science & Medicine* 1925, 1934:

This study capitalized upon a unique experiment in which homeless mentally ill adults were provided immediate access to independent housing without prior restrictions or proof of readiness. Contrary to the dominant policies and practices in the United States, housing first makes an offer that few individuals will (or did) refuse and from which most benefited, both materially and psychologically. Yet the fate of the homeless mentally ill in the United States is heavily influenced by programs and policies favoring transitional over permanent housing in the mistaken belief that such persons are not capable of stable, independent living in the community. Finally, this study has shown that the subjective experience of ontological security can now be extended from home-owners to newly housed persons with serious mental illness.

See also ‘1.4 The Evidence for Housing First’, *Housing First Europe Hub* (Web Page) <<http://housingfirsteurope.eu/guide/what-is-housing-first/the-evidence-for-housing-first/>>.

77 ‘1.4 The Evidence for Housing First’ (n 76).

78 Saunders claims that ‘home ownership is one expression of the search for ontological security, for a home of one’s own offers both a physical (hence spatially rooted) and permanent (hence temporally rooted) location in the world. Our home is unambiguously a place where we belong, and the things that we do there have an immediacy of presence and purpose. Putting all this in more familiar terminology, it may be suggested that home ownership represents an individual solution to the problem of alienation’: Saunders (n 10) 293.

79 Ann Dupuis and David C Thorns, ‘Home, Home Ownership and the Search for Ontological Security’ (1998) 46(1) *The Sociological Review* 24, 27.

80 Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press, 1991), as cited in Kearns et al, ‘“Beyond Four Walls”: The Psycho-Social Benefits of Home: Evidence from West Central Scotland’ (2000) 15(3) *Housing Studies* 387, 388: ‘The confidence that most human beings have in the continuity of their self identity and in the constancy of their social and material environments. Basic to a feeling of ontological security is a sense of the reliability of persons and things’.

Giddens famously identified a ‘problem of ontological security’ in the modern world,<sup>81</sup> attributable to sociological changes such as less ‘routine, face to face interaction’.<sup>82</sup> Home can respond to this lack of ontological security. It can provide the permanence and reliability that underpin ‘ontological security’.<sup>83</sup> Home, in this way, could possibly enhance ‘ontological security’.<sup>84</sup>

Debate exists over whether freehold owners enjoy more ontological security than leasehold owners.<sup>85</sup> That particular debate is not one the article proposes to enter. It is more suited to scholars in the disciplines of sociology and psychology. However, two passing observations are made. First, measuring ‘ontological security’ is difficult, if not impossible.<sup>86</sup> Particularly this is so because of ‘[t]he elusive nature of ontological security’.<sup>87</sup> How can something as amorphous as ‘confidence and trust in the world’ be measured?<sup>88</sup> And further, how can the precise impact of tenure type (leasehold or freehold ownership) on ontological security be measured? Ontological security is likely enhanced or undermined by many factors, including factors individuals are not aware of, and so which might remain undetected by scholars. Secondly, the debate over which tenure type

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81 Dupuis and Thorns (n 79) 26, citing Anthony Giddens, *The Constitution of Society* (Polity Press, 1984); Saunders (n 10) 293. See also Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990).

82 Dupuis and Thorns (n 79) 28, and citations to Giddens’ work therein.

83 Giddens explains: ‘Basic to a feeling of ontological security is a sense of the reliability of persons and things’: Anthony Giddens, *Modernity and Self Identity: Self and Society in the Late Modern Age* (Polity Press, 1991), cited in Kearns et al (n 80) 388.

84 See generally Saunders (n 10).

85 Hiscock et al, ‘Ontological Security and Psycho-social Benefits from the Home: Qualitative Evidence on Issues of Tenure’ (2001) 18(1–2) *Housing, Theory and Society* 50, 51. Saunders suggests that freehold ownership is more preferable for ontological security than leasehold ownership: see Saunders (n 10) 312:

The thesis that home ownership may generate ontological security has been subject to some scepticism in recent years, but by identifying a series of indicators it was possible to assemble a strong set of evidence to support the thesis.

Others disagree: see Hiscock et al (n 85) 62–3:

[W]e propose that greater ontological security is not necessarily to do with tenure itself: it is to do with having wealth, living in a nice area, living in a larger and better quality dwelling and being settled in relationships and work ... [O]wner occupation offers the benefits of ontological security due partly to a rosy association of the tenure with stability (something which is often not true), and due to a strong desire to enter the mainstream and demonstrate personal progress – something which renting (private or public) is largely incapable of doing’.

Other housing studies literature on the relevance of tenure type to ontological security is usefully summarised: at 51. For general discussion of the conflicting literature in this area, see Rowland Atkinson and Keith Jacobs, *House, Home and Society* (Palgrave, 2016) 40–2.

86 Michael Harloe, ‘Sector and Class: A Critical Comment’ (1984) 8(2) *International Journal of Urban and Regional Research* 228, 236. Harloe suggests the hypothesis that ontological security explains ‘demand for owner occupation’ is ‘unsubstantiated (and unprovable?)’. See also Saunders (n 10) 293: ‘The concept of ontological security is difficult to operationalize empirically, and to test whether home ownership has any effect on levels of ontological insecurity we should presumably need to utilize sophisticated indicators of people’s level of worry, concern and paranoia as well as measures of self-conception and positive social identity’.

87 Hiscock et al (n 85) 52.

88 Dupuis and Thorns (n 79) 27.

enjoys more ontological security is largely academic.<sup>89</sup> Just because a particular tenure might provide more ‘ontological security’, that does not preclude ‘ontological security’ under the other.<sup>90</sup> Further, in Australia there is an increasing number of people renting<sup>91</sup> and, as such, the policy focus should also be on enhancing home – and ontological security – under leasehold, and not just on showing the superiority of freehold ownership.

## 2 *Expression of Self-Identity*

Homes are particularly important places for identity, which is unsurprising given that individuals spend significant amounts of time in, and are likely to have more control over, their homes than compared to other spaces.<sup>92</sup> Home thus represents the expression of self-identity.<sup>93</sup> This is a further dimension of home considered in this article. French philosopher Simone Weil recognised this identity dimension of home when she wrote that

the soul feels isolated, lost, if it is not surrounded by objects which seem to it like an extension of the bodily members ... The forms this need takes can vary considerably, depending on circumstances, but it is desirable that the majority of people should own their house and a little piece of land round it.<sup>94</sup>

Weil believed, therefore, private property to be ‘a vital need of the soul’.<sup>95</sup>

Home scholarship confirms the view that homes manifest individuals’ self-identity. Homes have, thus, been described as ‘a world in which a person can create a material environment that embodies what he or she considers significant. In this sense the home becomes the most powerful sign of the self of the inhabitant who dwells within’.<sup>96</sup> Further, homes are ‘a space to develop an identity, and they are “cultivators” and symbols of the self’.<sup>97</sup> Homes, over time,

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89 The relevance of the debate seems merely to be to show that one tenure – freehold ownership – is superior and so should be accessible to as many people as possible: see generally Saunders (n 10). This article agrees with Saunders’ view that freehold ownership is a superior tenure and so should be accessible. However, this article does not need to enter an intractable debate about ‘ontological security’ to make that point.

90 Saunders (n 10) 303: that ‘home ownership enables ontological security does not mean that non-ownership prevents it’.

91 See, eg, Kath Hulse, Vivienne Milligan and Hazel Easthope, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (Final Report No 170, Australian Housing and Urban Research Institute, July 2011) 4.

92 ‘The occupied home is a “primary territory” – it is a place where we spend much of our time, with the people who are most important to us. We look to our homes to satisfy a range of social and psychological needs; control over our environment; an appropriate physical framework for family life; a place for self-expression; and (where home meanings are positive) for feelings of security’: Fox O’Mahony (n 25) 162.

93 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 598.

94 Simone Weil, *The Need for Roots* (Harper and Row, 1971), cited in D Geoffrey Hayward, ‘Home as an Environmental and Psychological Concept’ (1975) 20 *Landscape* 2, 8.

95 *Ibid.*

96 Mihaly Csikszentmihalyi and Eugene Rochberg-Halton, *The Meaning of Things: Domestic Symbols and the Self* (Cambridge University Press, 1981) 123, cited in Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 599.

97 Helga Dittmar, *The Social Psychology of Material Possessions* (Harvester Wheatsheaf, 1992) 113, cited in Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 598–9.

come to reflect 'one's ideas and values',<sup>98</sup> 'a mergence of the person and the place',<sup>99</sup> 'a symbol of one's self',<sup>100</sup> and are possibly 'the most powerful extension of the psyche'.<sup>101</sup>

Csikszentmihalyi's and Rochberg-Halton's research establishes that home is a 'symbolic environment'.<sup>102</sup> An occupier is quoted in describing their basement area:

In my little study which I arranged downstairs ... I built all the furniture, the desk, chair, bookcase, everything down there, so they surround me. It's a sort of womblike area, situation. It's quiet and it's cool ... I have a warm feeling about the things that I've built.<sup>103</sup>

This individual's identity manifests in the furniture (which they built).<sup>104</sup> Another occupier, from the same study, commented: 'a house reflects where you are in your life'.<sup>105</sup> Home, for these occupiers, images their self in particular ways.

Sixsmith's study quotes an occupier describing home as akin to the experience of being accepted, which is clearly very affirming of selfhood. They comment: 'You're bringing a part of yourself into the place – in your things. You feel like you're accepted in it 'cos you can be yourself in it, you created it. I can relax control over myself and just be myself. If you can't be yourself at home, where can you?'<sup>106</sup> The self of this individual exists through 'things', in a space they created. Sebba and Churchman's study, referred to earlier, also demonstrates '[t]he home as a place for self-expression'.<sup>107</sup> There is also a very interesting study of individuals being shown photographs of other individuals' homes. From these photographs, the individuals being shown photographs 'could accurately predict the [occupier's] self-concept'.<sup>108</sup> The appearance of others' homes, which embodies the self, is clearly apparent to others, ie, not only the home occupier.

These studies were conducted with occupiers outside of Australia. However, Australian occupiers also seek to express their identity in home. Evidence of this

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98 Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 24 (emphasis in original): '[H]ome as a centre for self-identity, which offers a reflection of one's ideas and values, and acts as an indicator of personal status'.

99 Fox O'Mahony (n 25) 163.

100 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 598.

101 Després (n 43) 100.

102 Csikszentmihalyi and Rochberg-Halton (n 96) 121 ff.

103 Ibid 137.

104 'Again, the sexual asserts itself in the male's choice of the basement den and recreation area as their favourite place, which they mention much more often than their wives. In the following response one finds clear examples of the masculine instrumental orientation and also of the usually less obvious, almost childlike, emotional dependence': ibid 135–7.

105 Ibid 128.

106 Sixsmith (n 69) 290.

107 Sebba and Churchman (n 58) 9: '[H]ome is the only place that the individual can change or maintain as the same. One organizes the home according to one's needs and tastes, and gives the home one's personal, unique meaning. One can express oneself freely in the home and can be oneself'.

108 Smith (n 68) 33, discussing Edward K Sardalla, Beth Vershure and Jeffrey Burroughs, 'Identity Symbolism in Housing' (1987) 19(5) *Environment and Behaviour* 569.

exists in the form of marketing materials for a new model of rental accommodation in Melbourne. The materials for the ‘Assemble Model’ appeal to Australian occupiers’ desire for identity in home, particularly referring to the ‘freedom to customise the space just how you want it – from day one’ and to ‘lay down your roots and make yourself at home, with the freedom to create a space that’s already yours’.<sup>109</sup> The model purportedly confers all this through a (longer than usual) five year lease, with an option to purchase.

It is important to note that homes project identity in a dual way. They project an individual’s identity presently, as described above. They also project identity into the future. Indeed, homes are arguably the main basis on which an individual’s future self-identity can develop. Dovey explains: ‘Knowing that we have the power to remain in a place and change it permits us to act upon and build our dreams’.<sup>110</sup> Homes, in this way, give occupiers ‘a connection into the future’<sup>111</sup> and through which they can envisage a future identity. Fox also makes the point; homes enable individuals to know ‘where [they] are and where [they] will be’ in the future, and so they are able ‘to plan ahead’.<sup>112</sup>

Related to self-identity is the idea of social identity. Social identity refers to how individuals are perceived in a society.<sup>113</sup> Homes are relevant to this in signalling social identity.<sup>114</sup> Rakoff explains

the house was seen as an indicator of personal status and success, both one’s own and others ... people spoke of the self-judging they went through, seeing evidence of their own success or failure in life in the quality of spaciousness of their houses, in their ability or inability to ‘move up’ to better houses periodically, or even the mere fact of owning some property or a house.<sup>115</sup>

Fitchen’s research confirms home signals social identity, with residents classifying themselves publicly as ‘homeowner’<sup>116</sup> – a ‘respected category of people’.<sup>117</sup> ‘Homeowner’ indicates significant responsibility and ‘a long-term commitment to the work ethic’.<sup>118</sup> Australians have, anecdotally, been known to use the ‘homeowner’ category to reflect social status, as for example, when people buy a new home and post on Facebook: ‘Homeowners!’

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109 Assemble, ‘8 Things You’d Never Expect as a Renter’, *realestate.com.au* (Web Page, 2 November 2018) <<https://www.realestate.com.au/advice/8-things-you-d-never-expect-as-a-renter/>>.

110 Dovey (n 2) 43, cited in Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 599.

111 Ibid.

112 Fox O’Mahony (n 25) 163.

113 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 599–600. See also Rakoff (n 28) 93: ‘[T]he house was seen as an indicator of personal status and success, both one’s own and others’. Separately, it is important to acknowledge that a particular place might also be part of a person’s identity, quite apart from a dwelling house: see Jeanne Moore, ‘Placing *Home* in Context’ (2000) 20(3) *Journal of Environmental Psychology* 207, 211.

114 See above n 113.

115 Rakoff (n 28) 93.

116 Fitchen (n 58) 320.

117 Ibid, cited in Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 604–5.

118 Ibid.

### 3 Relationships and Family

Home is also relational in that a sense of home derives from close relations with others in a place.<sup>119</sup> Relationships, and in particular familial or familial-like relationships, are thus important to the experience of home.<sup>120</sup> This plays out in research which demonstrates home's association with *family*.<sup>121</sup> Fitchen's research elicited a 'close association between home and family' for residents<sup>122</sup> impacted by environmental contamination: 'Their comments, complaints and cries of anguish were laced with references to family: "what about my family?" "I have my family to think about here?"'.<sup>123</sup> Similarly, the close association between family and home revealed itself in subsidiary research Fitchen conducted with residents not impacted by contamination:

Respondents representing a diversity of geographic, socio-economic, age, and occupational characteristics were asked to complete the sentence 'Home is a place where ...'. Among the 425 respondents (243 female, 177 male, 5 undesignated; ages 18–68), the most common response – mentioned 112 times out of about 600 responses – was a reference to 'family' or specific family members (e.g., parents, wife/husband, children). A frequent first answer was 'where my family is'. Thus, this research probe substantiated our observation in communities that contamination within the home environment would be particularly upsetting because home is the place of the family.<sup>124</sup>

Rakoff, in separate research, has similarly found that residents 'agreed that it is the presence of children and the activity of family life that makes a house into a home'.<sup>125</sup> And home has even been philosophised as an experience of other people, in the sense that other people show the individual to themselves,<sup>126</sup> and

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119 Després (n 43) 98:

Home as a place to strengthen and secure the relationship with people one cares for, emerged as a powerful category of meaning. Home is perceived and experienced as the locus of intense emotional experience, and as providing an atmosphere of social understanding where one's actions, opinions, and moods are accepted. Ideas such as a place to share with others, to entertain with relatives and friends, and to raise children, are related to this dimension.

120 Interestingly, home as a place for privacy and family is a modern phenomenon: see Tamara K Hareven, 'The Home and the Family in Historical Perspective' (1991) 58(1) *Social Research* 253, 254:

The close identification of home with family is a relatively recent phenomenon that can be traced to the late eighteenth or early nineteenth century. The concept of the home as the family's haven and domestic retreat emerged only about one hundred fifty years ago, and was, initially, limited to the urban middle classes. In order to understand the development of the home as the family's abode, as a reality and as an ideal, it is necessary to examine the relationship between household, family, and home as they changed over time.

121 Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 600 (and studies cited therein) (emphasis in original): 'Research into modern social and cultural meanings of home has indicated that it is the association with *family* that gives the contemporary home cultural centrality'.

122 Fitchen (n 58) 315, discussed in Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (n 2) 600.

123 Fitchen (n 58) 315.

124 Ibid 316.

125 Rakoff (n 28) 93.

126 Shelley Mallett, 'Understanding Home: A Critical Review of the Literature' (2004) 52(1) *The Sociological Review* 62, 83; Kuang-Ming Wu, 'The Other is My Hell; the Other is My Home' (1993) 16(1–2) *Human Studies* 193.

thus in other people the person finds home. Kuang-Ming Wu explains home in this way: ‘Home is where I both was born and am being continually born, within that womb called other people, in their being *not* me’.<sup>127</sup>

Other relationships, beyond family, can also be important to home.<sup>128</sup> Sixsmith explains:

Home is not only a place often shared with other people but is also a place allowing entertainment and enjoyment of other people’s company such as friends and relatives. As one person said: ‘It wouldn’t be home without the family, now would it. And then you can bring people you like, your friends, back and make them a meal or just sit and chat. There’s no front to it, just being together ... well, it’s hard to explain, if it wasn’t home it wouldn’t be the same’.<sup>129</sup>

Separate research has shown the relationship between landlord and tenant is important to home. This relationship can impact a tenant’s sense of security in a home.<sup>130</sup> In the Australian context specifically, research conducted with those share housing in inner Sydney found a sense of home among the household.<sup>131</sup>

### C Home as Identity – Critique

Some scholars consider the extent to which home reflects identity – the second dimension of home discussed above – to be overstated, notwithstanding evidence such as above. Their reflection is generally that self-identity in home is not as strong as assumed or that it might not be essential to functioning. Stern, the main proponent of this view, asserts, ‘there is scant empirical support for the proposition that homes are requisites of psychological functioning such that object loss imperils the dispossessed owner’s self-concept or impedes psychological functioning’.<sup>132</sup> Stern’s argument is ‘that it is not “the home” as a possession which is psychologically important to self and self-flourishing, but social relations’.<sup>133</sup> Barros takes a similar view, believing the ‘personhood’ theory of property, espoused by Radin,<sup>134</sup> to be overstated: ‘[T]he literature on the psychology of home suggests that the possessory interest in the home, while

<sup>127</sup> Wu (n 126) 195, cited in Mallett (n 126) 83 (emphasis in original).

<sup>128</sup> Sixsmith (n 69) 291: ‘[S]ocial networks built around a home and the relationships that create and are created in a home are of utmost importance’. See also Smith (n 68) 33 (and studies cited therein).

<sup>129</sup> Sixsmith (n 69) 291.

<sup>130</sup> Aubrey R Fowler III and Clifford A Lipscomb, ‘Building a Sense of Home in Rented Spaces’ (2010) 3(2) *International Journal of Housing Markets and Analysis* 100, 112: ‘A good landlord-tenant relationship, it seems, enhances the sense of safety and security that one feels within the apartment’.

<sup>131</sup> Sophie McNamara and John Connell, ‘Homeward Bound? Searching for Home in Inner Sydney’s Share Houses’ (2007) 38(1) *Australian Geographer* 71, 88: ‘“Home” in the share houses of contemporary Sydney is substantially reliant on the ideology of friendship. Friends have great influence on the decision to live in a share house and the intimacy of relations between housemates blurs the boundary between friendship and family’.

<sup>132</sup> Stephanie M Stern, ‘Residential Protectionism and the Legal Mythology of Home’ (2009) 107(7) *Michigan Law Review* 1093, 1096.

<sup>133</sup> Fox O’Mahony (n 25) 164.

<sup>134</sup> Radin famously theorised that certain types of property, among them the home, are a part of personhood: see Radin (n 17) 959: ‘These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house’.

substantial, may not be as strong as Radin asserts'.<sup>135</sup> Barros thus considers 'Radin's intuitive view tends to overstate an individual's personal connection to a home in a particular location because many of the important personal values associated with a home are movable'.<sup>136</sup> Ultimately, these claims are used to support Stern's and Barros' shared view that laws have overprotected the home.<sup>137</sup>

Barros' and Stern's respective arguments that law overprotects home are unconvincing. Both focus narrowly on 'home as identity', when home is a much broader concept.<sup>138</sup> Home is, as demonstrated, about physical shelter, financial security and emotional security.<sup>139</sup> This article agrees with Fox O'Mahony in this critique of Stern, and with the following:

The 'myth of home' which Stern critiques treats home scholarship as a 'theory of property', rooted in a single strand within the 'identity cluster'; rather than as a 'theory of human experience' based on the indistinguishable elements of home as a physical, financial and experiential concept.<sup>140</sup>

What this is saying is that home should be comprehended in its fullness.<sup>141</sup> Stern and Barros, to the extent they do otherwise, cannot then justifiably assert that law overprotects home as they will not have comprehended all dimensions of home. How can they properly assess if laws overprotect home if they do not understand that foundational concept? In direct opposition to Barros' and Stern's arguments, this article hypothesises – for future research purposes – that there are laws which under-protect home in Australia, risking 'homelessness'.<sup>142</sup>

## D Experience of 'Homelessness'

'Homelessness' is the opposite of home. It means a lack of the experience of home.<sup>143</sup> This conceptualisation recognises 'there is much more to homelessness than the minimal definition of rooflessness', ie, the lack of physical shelter.<sup>144</sup>

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135 D Benjamin Barros, 'Home as Legal Concept' (2006) 46(2) *Santa Clara Law Review* 255, 277.

136 Ibid 280.

137 Ibid 259: '[T]he unique nature of the home justifies additional legal protection in some, but not all, circumstances'. Stern (n 132) 1097: 'The central claim of this Article is that the psychological and social benefits of remaining in a particular home do not warrant the vast apparatus of categorical protections that pervade American property law'. See also Nestor M Davidson, 'Property, Well-being, and Home: Positive Psychology and Property Law's Foundations' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 47, 57: 'On the one hand, things – objects – appear not to make most people happy in comparison to experiences and relationships. This might suggest contexts where less vigorous property rights might prevail, even for resources otherwise clearly constitutive of the self'.

138 Fox O'Mahony (n 25) 164: home encompasses all 'the indistinguishable elements of home as a physical, financial and experiential concept'.

139 Ibid.

140 Ibid.

141 Ibid.

142 Somerville (n 5).

143 This is a broader understanding of 'homelessness' which is often used to describe the lack of a physical shelter, ie, house: *ibid*.

144 Ibid 536.

Physical shelter might exist, yet individuals can still be ‘homeless’ because they lack home. Physical shelter, in other words, does not – alone – guarantee the home experience. This important point can very easily be overlooked – and understandably, when there still exists in wealthy countries, of which Australia is one, the more pressing social problem of ‘roofless’: people with no housing at all.

As ‘roofless’ entails a complete absence of home – both as physical shelter and experience – it is indeed a more pressing social problem than ‘homelessness’. Physical shelter is essential to an individual’s survival – and, one could add, to the individual’s freedom. Jeremy Waldron’s essay titled ‘Homelessness and the Issue of Freedom’<sup>145</sup> explores how homelessness – essentially a lack of private space because of a lack of private property<sup>146</sup> – is an issue going to ‘basic principles of freedom’.<sup>147</sup> The homeless person lacks freedom because they are restricted in their actions. In the public places, where they must exist, they might not be allowed to perform basic human activities.<sup>148</sup> Waldron explains: ‘What is emerging – and this is not just a matter of fantasy – is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around’.<sup>149</sup> ‘Their homelessness *consists* in unfreedom’.<sup>150</sup> In society, there is a clear distinction between the homeless – who lack freedom – and those with home who are free because their private property rights entitle them to do things on their property not done in public places.<sup>151</sup> Of course, there are other horrible consequences of homelessness beyond a lack of freedom, including despair, disease, loneliness, and shame.<sup>152</sup> However, a lack of freedom is particularly pernicious. As Waldron writes, ‘what we are dealing with here is not just “the problem of homelessness”, but a million or more *persons* whose activity, dignity and freedom are at stake’.<sup>153</sup>

But none of this is to deny that the absence of the home experience – described above – is also a problem which needs addressing as part of the response. Home, the experience, should be accessible to all. Logically, for

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145 Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993).

146 Ibid 313: ‘A technically more accurate description of his [homeless person’s] plight is that there is no place governed by a private property rule where he is allowed to be whenever *he* chooses, no place governed by a private property rule from which he may not at any time be excluded as a result of someone else’s say-so’ (emphasis in original).

147 Ibid 309.

148 Ibid 325–9.

149 Ibid 315.

150 Ibid 320 (emphasis in original).

151 Ibid 325: ‘But without a home, a person’s freedom is his freedom to act in public, in places governed by common property rules. That is the difference between our freedom and the freedom of the homeless’.

152 Ibid 337: ‘Lack of freedom is not all there is to the nightmare of homelessness. There is also the cold, the hunger, the disease and lack of medical treatment, the danger, the beatings, the loneliness, and the shame and despair that may come from being unable to care for oneself, one’s child, or a friend. By focussing on freedom in this chapter, I have not wanted to detract from any of that’.

153 Ibid 338 (emphasis in original).

adequate housing, a roof will be the starting point,<sup>154</sup> but there is a need to go beyond the mere provision of housing.<sup>155</sup> Laws must themselves ensure home by enhancing the conditions necessary for home,<sup>156</sup> thereby expanding beyond ownership merely of house.<sup>157</sup>

### III CONDITIONS FOR HOME

Conditions necessary to experience home are many and varied; this follows from home being a multifaceted and subjective experience.<sup>158</sup> All the various conditions work together to create home, as Dovey explains: ‘There is no precise point at which a house becomes a home, and none of the properties that I have outlined previously are necessary nor sufficient for the experience of home. Rather, like fibres in a rope, each property lends strength to the meaning of home’.<sup>159</sup>

Two very important conditions for home are: (i) housing stability; and (ii) housing control. These conditions are discussed in detail here. In particular, the article recognises that Australian real property law impacts significantly on these conditions (and so on home). Other conditions for home are also briefly discussed in this Part. This demonstrates the complexity of home and that home is impacted by many conditions (which, unlike housing stability and housing control) are very much outside laws’ control. Laws cannot, therefore, ensure home on their own. Laws should not be seen as a panacea to ensure the experience of home. However, laws can support and empower individuals to experience home, with residential tenancy law being the classic example of this in respect of occupiers under leasehold ownership.

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154 See, eg, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1) (‘ICESCR’): ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent’; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17(1)–(2) (‘ICCPR’): ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’. See also Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UNESCOR, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991) para 1.

155 International human rights law recognises ‘merely having a roof over one’s head’ is not enough. Its concern is, more broadly, to ensure ‘the right to live somewhere in security, peace and dignity’. Housing must, therefore, be ‘adequate’ having regard to legal security of tenure, affordability and habitability: Committee on Economic, Social and Cultural Rights (n 154) paras 7–8.

156 The challenge is in overcoming ‘conditions that can erode the experience of home and paralyse its emergence’: Dovey (n 2) 34.

157 See above n 19.

158 See Dovey (n 2) 51–2 regarding six ‘properties of homelessness’.

159 Dovey (n 2) 51, cited in Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 179.

## A Housing Stability

A very important condition for home is housing stability.<sup>160</sup> Housing stability is the state of being able to remain in current housing. Individuals who perceive this stability in their housing situation are empowered to experience home. Conversely, individuals who perceive an unstable and interim housing situation are at risk of ‘homelessness’. Whether individuals have housing stability depends on all the circumstances, including legal, social and economic. These circumstances might enhance housing stability. Alternatively, they might lead to unstable housing and possibly prompt occupiers to leave their housing when they desire to stay.<sup>161</sup> This would be to the detriment of home. To give one example of a law undermining housing stability, insecure legal tenure, where landlords can terminate a tenancy for ‘no reason’, is a legal circumstance (ie, a law) contrary to housing stability and so to home. However, presently, the discussion is on establishing housing stability as a condition for home. Housing stability is vital to home – to the feeling of security, the expression of identity, and relationships and family. Ample evidence exists to support this particular claim.

### 1 *Relevance to Feeling of Security*

Regarding the feeling of security, Sebba and Churchman’s research, referred to earlier, establishes that security derives from home’s ‘permanency’, specifically from ‘the knowledge that nobody can force them [occupiers] to leave’.<sup>162</sup> The feeling of security derives from housing stability, in other words. Other scholars also acknowledge housing stability as a condition for home. Fox O’Mahony explains that home fosters ‘a sense of belonging, “rootedness”, continuity, stability and permanence ... [t]hrough its familiarity’.<sup>163</sup> This presupposes housing stability, as familiarity is built over time. Després, similarly, recognises housing stability. Home, she explains, is a ‘temporal process that can only be experienced along time. Along weeks, months, or years, the home becomes a familiar environment, a place that provides its occupants with a sense of belonging somewhere, of having roots’.<sup>164</sup>

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160 Stability is ‘the state of being stable’, that is, ‘not likely to change or fail’: *Oxford Dictionary* (online at 1 October 2019) ‘stability’ and ‘stable’ (adj, def 1.3).

161 This conceptualisation of housing stability draws heavily on the concept of ‘secure occupancy’ proposed specifically to evaluate conditions for leasehold occupiers by Hulse, Milligan and Easthope. By contrast, this article’s conceptualisation of ‘housing stability’ applies to evaluate conditions regardless of the tenure occupiers are under, ie, freehold or leasehold ownership. ‘The concept of secure occupancy refers to the nature of occupancy of residential dwellings and the extent to which households can make a home and stay there for reasonable periods if they wish to do so, provided that they meet their obligations’: Hulse, Milligan and Easthope (n 91) 20; ‘[F]our perspectives’ are used to evaluate ‘secure occupancy’: market lens, legal lens, social policy lens and socio-cultural lens: at 2. See also, ‘Simply living in a location for a longer period of time allowing for the development of a pool of memories or simply familiarity may assist the process of building home’: Fowler and Lipscomb (n 130) 114.

162 Sebba and Churchman (n 58) 9.

163 Fox O’Mahony (n 25) 162.

164 Després (n 43) 98.

Evidence that housing stability promotes security is illustrated by a case study of Victorian protected tenancies. A 1995 report, produced by the Tenants Union of Victoria ('TUV'), tells 'the story of protected tenancies in Victoria'.<sup>165</sup> That story is one of how protected tenants enjoyed particular housing stability under specific legislation making it difficult to evict them during their lifetime,<sup>166</sup> and that shielded them from excessive rent increases.<sup>167</sup> Overwhelmingly, as a result of their housing stability in this regard, Victorian protected tenants felt secure in and through their homes. Interviews were conducted by the TUV, with protected tenants, who said, variously:

'I've felt secure here. I haven't been kicked around or anything. It makes you feel more secure and safer. I suppose if I had my own home, I wouldn't be here but I'd rather be here ... I don't think I would fit in anywhere else now, I've been safe here for so long ... I feel so much more secure knowing that I am a protected tenant'. – Phyllis, first moved into Albert Park house in 1952.<sup>168</sup>

'Well I feel safe, that I'm not going to be tossed out at any minute'. – Lillian Wilson, first moved into Blackburn house in 1951.<sup>169</sup>

'That's why I don't want to go away. If I wasn't protected I'd feel terrible. It would worry the life out of me ... I don't know how I would manage moving ... with this breathing thing ...' – Marjorie Maloney, first moved into North Caulfield house in 1939.<sup>170</sup>

'Being a protected tenant has made me feel secure'. – Jim.<sup>171</sup>

'Being protected tenants, we feel safe. We know, well we hope, they can't just come to the door one day and say we want you out'. – Peg and Arthur Olsen; Edith Williams, family first moved into Richmond cottage terraces in 1931.<sup>172</sup>

'I suppose being a protected tenant has meant that I haven't felt anxious that they could evict me'. – Olga Finkelstein, moved into St Kilda house in 1936.<sup>173</sup>

165 Dave Macrae, Julie Fry and Mary Roberts, *Theirs for the Duration: Protected Tenants in Victoria 1939–1995* (Report produced for the Tenants Union of Victoria, 1995) 6. Protected tenancies first came into being at the beginning of the Second World War, ie, 1939–45. They were a response to a housing shortage in wartime and an attempt to preclude landlords from profiteering from individuals desperate for housing. Protected tenancies had their basis in Commonwealth regulations 'to control rent and limit evictions'. Eventually, these protected tenancies came to exist under state legislation and remained for a period after the war. In Victoria, protected tenancies continued to be granted up until 1 January 1956. The laws regulating remaining protected tenancies then existed in the *Landlord and Tenant Act 1958* (Vic), until its repeal in 2012 by section 236 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic): at 2. It is also notable that protected tenancies existed in other jurisdictions. In NSW, for example, see Leesha McKenny, 'Protected Tenants Face Uncertain Future', *The Sydney Morning Herald* (online, 22 November 2012) <<https://www.smh.com.au/national/nsw/protected-tenants-face-uncertain-future-20121121-29q3c.html>>.

166 Regarding evictions, despite grounds for termination, a tribunal needed to be satisfied the eviction would not cause significant hardship. As most protected tenants were elderly, and had been in their homes for a long time, arguments could easily be made that eviction would cause hardship: Macrae, Fry and Roberts (n 165) 3.

167 Landlords could only increase rents with tribunal approval, having regard to financial hardship: *ibid*.

168 *Ibid* 17.

169 *Ibid* 23.

170 *Ibid* 29.

171 *Ibid* 47. Note that details for Jim's place of residence, and year of moving there, are not available in the source.

172 *Ibid* 59.

‘A weight lifted off our shoulders [on realising their protected tenant status], you’ve no idea! Being protected tenants has meant that this is really our home, we know we’re going to be here forever’. – Jack and Betty Hannah.<sup>174</sup>

The significant housing stability afforded by their protected tenant status has meant, for these individuals, feeling very secure through housing.

## 2 *Relevance to Self-Identity*

Housing stability is also vital to home, to the expression of identity. Again, ample evidence exists to support this proposition, discussed below. Put simply, individuals who know they can remain in a place (ie, who have housing stability) are more likely to see their identity in the place and, further, engage in creative activities expressive of identity in home. Examples of these activities are renovations, gardening, painting and decorating. Alternatively, and by contrast, individuals only in a place for a short period of time, or for an uncertain period (ie, who lack housing stability) are unlikely to express their identity in home. More likely, they are not going to invest their identity in a home from which a move is potentially imminent.<sup>175</sup> Lacking in housing stability, they might be less able to experience home as an expression of identity.

Evidence of individuals with significant housing stability expressing identity in their homes exists. This comes, again, from Victorian protected tenants interviewed by the TUV:

‘I’ve got a garden outside, I’ve got tomatoes and silverbeet. All the friends I’ve got are around this way. If I went to another suburb I wouldn’t know anybody. I don’t think I would fit in anywhere else now’. – Phyllis, first moved into Albert Park house in 1952.<sup>176</sup>

‘... I have always done things inside. I was never asked to do them. My husband always did the painting, and we rewired as well’. – Lillian Wilson, first moved to Blackburn house in 1951.<sup>177</sup>

‘Everything I have has gone into this place ...’ ‘... I wouldn’t have spent so much money on the garden if I thought that I was going to be subject to continual legal action to get me out ...’ – Jim.<sup>178</sup>

‘We’ve loved living here. It’s our home. We never asked for any repairs, we’ve done them all ourselves. The house is in good condition but see, we kept it this way, with Jack’s wages before he retired. Let’s face it we have a cheaper rent but we kept the place so it’s nice’. ‘Our family grew up here, we used to have great evenings around the pianola singing, and the kids used to bring their friends over and they’d dance on Saturday nights! I used to join in doing these crazy new dances, I’d say, *If you can’t beat them, join them!*’ – Jack and Betty Hannah.<sup>179</sup>

173 Ibid 85.

174 Ibid 53. Note that details for Jack and Betty’s place of residence, and year of moving there, are not available in the source.

175 Another reason individuals might not be able to invest their identity in a home is if their lease precludes them making the alterations they wish to make. This concerns housing control, which is the second condition for home discussed below. See below n 209 and 210 and accompanying text.

176 Ibid 17.

177 Ibid 22.

178 Ibid 47. Note that details for Jim’s place of residence, and year of moving there, are not available in the source.

179 Ibid 53. Note that details for Jack and Betty’s place of residence, and year of moving there, are not available in the source.

'I put in shelves, altered the kitchen, had the place painted throughout six times. It's been twice carpeted. Everything is mine except the stove. As you get older [she admits to being past the age of 90] you feel more a part of it and less able to visualise yourself anywhere else. It's a quiet street and I know the people around here'. – Dorothy Harper, in Elwood home since at least 1954.<sup>180</sup>

The significant housing stability afforded by their protected tenant status has meant, for these individuals, the possibility of abundantly investing themselves in their home, in the knowledge that they cannot easily be forced to leave.

Memories, another part of identity, form in places, as is clear from Jack and Betty Hannah's comment recalling dances around the pianola. Memories are part of identity because they reflect back to individuals 'who they are'.<sup>181</sup> Sixsmith explains that 'knowledge of the home and the important events people have experienced there are strong ties between that environment and the person. These can become integral parts of the person's history and sense of identity and continuity'.<sup>182</sup>

A further example of memories in places, forming a part of identity, is apparent in the description of how the Kaluli, an indigenous tribe of Papua New Guinea, view their home: 'Each person knows the streams and landmarks of his longhouse territory, and these recall the people he worked with and shared with there. This growth of young trees, that patch of weeds with a burned house post, this huge Ilaha tree that dominates the crest of a ridge, reflect the contexts and personalities of his life'.<sup>183</sup> Only through memories have the 'huge Ilaha tree' or 'the streams' come to 'reflect the contexts and personalities' of Kuali lives.<sup>184</sup>

Naturally, sustaining memories tend to form in places that individuals have spent sufficient time in. This is because memories develop and enrichen overtime. Housing stability – the ability to stay – is thus necessary so that individuals can form memories in houses (and more fully enjoy the identity dimension of home). If housing stability is non-existent, individuals are likely to forget, and forgetfulness is the opposite of memory. Elie Wiesel notes: 'Forgetfulness by definition is never creative; nor is it instructive. The one who

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180 Ibid 63.

181 Homes become a 'mnemonic anchor' which tell us 'who we are by where we have come from': Dovey (n 2) 42; 'Our memories, particularly memories with personal or biographical content, are "keyed in" to our homes; like us, our memories are "housed" in the places where we live': Fox O'Mahony (n 25) 163.

182 Sixsmith (n 69) 290. The following statement from one of the interviewees captures it: 'Things have happened here, things that're important to me ... it's the place I was away from home first, I was independent and doing things for myself, you know for the first time. I grew up in it. That made it home for me': at 291.

183 Edward L Schieffelin, *The Sorrow of the Lonely and Burning of the Dancers* (St Martin's, 1976) 182, quoted in Dovey (n 2) 42.

184 While the tribe may or may not have a house in the sense of a bricks-and-mortar dwelling, they clearly have a place. In this place, memories have formed over time, and thus also identity and home. The example was selected because it so vividly demonstrates the importance of memories, which require time to form and thus housing stability.

forgets to come back has forgotten the home he or she came from and where he or she is going'.<sup>185</sup>

Unfortunately, this lack of staying in one place is characteristic of postmodern society. Bouma-Prediger and Walsh explain: 'The postmodern nomad, by contrast, has no sense of place: he merely roams from one place to another. Or, more precisely, he wanders from no place to no place, since no particular place takes on sufficient significance to distinguish it from any other. No specific place is invested with enough story-soaked meaning to make it a place to which one would want or need to return'.<sup>186</sup> Further, they add: 'Once we have forgotten the stories, there is no home to return to, because there is no place, or even potential place, that could be shaped by those stories. Houses become homes when they embody the stories of the people who have made these spaces into places of significance, meaning, and memory'.<sup>187</sup> Further again: 'A house becomes a home when it is transformed by memory-shaped meaning into a place of identity, connectedness, order, and care'.<sup>188</sup>

### 3 *Relevance to Relationships and Family*

Regarding relationships and family, law cannot guarantee the close relationships which clearly contribute to a sense of home. This naturally leads to the conclusion that law cannot, on its own, ensure this dimension of home. However, laws can enhance these close relationships through ensuring housing stability. The logic here is that relationships form over time, in a place. The home is a common place for these relationships to form. It is in home that families are formed, go out, and return to be nourished by each other, in community with each other.<sup>189</sup> However, a lack of housing stability – being able to remain in a place – can dislodge or preclude the forming of close relationships, both within the household, and more broadly with neighbours and local community. Law can, by promoting housing stability, enhance this relational dimension of home. Alternatively, laws might undermine the relationships forming part of home. An example of a law doing that is the UK law known as the 'Right to Rent'. This immigration law empowers the Secretary to direct a private landlord to evict individual tenants who do not have a right to remain in the UK.<sup>190</sup> This law – itself a unique example of immigration law infiltrating residential tenancy law – will 'disrupt and break the social ties between resident non-nationals and

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185 Elie Wiesel, 'Longing for Home' in Leroy S Rouner (ed), *The Longing for Home* (University of Notre Dame Press, 1996), 19, cited in Steven Bouma-Prediger and Brian J Walsh, *Beyond Homelessness: Christian Faith in a Culture of Displacement* (William B Eerdmans Publishing Company, 2008) 9.

186 Ibid 45.

187 Ibid 59.

188 Ibid 58.

189 Altman and Werner (n 21) xix: houses are where 'families establish, grow, and bond themselves into a unit' and 'to the larger society'.

190 Richard Warren, 'The UK as a Precarious Home' in Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times* (Hart Publishing, 2018) 203, 221.

citizens', with possible 'divisive consequences', according to Warren.<sup>191</sup> It makes the UK 'a precarious home' for non-nationals.<sup>192</sup>

#### 4 Relevance to International Human Rights Law

The proposition that housing stability is essential to home is also reflected in international human rights law. The *International Covenant on Civil and Political Rights*, in article 17(1), contains a right not to have, among other things, home 'subjected to arbitrary or unlawful interference'.<sup>193</sup> Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') incorporates this same right protecting 'home', in largely the same terms.<sup>194</sup> Persons have a right not to have their 'home' 'unlawfully or arbitrarily interfered with'.<sup>195</sup> In applying this right, a preliminary step is needed to determine if a premise is someone's 'home'. Justice Bell has opined: 'In human rights, identifying a person's "home" is approached in a commonsense and pragmatic way. It depends on the person showing "sufficient and continuous links with a place in order to establish that it is his home". ... If someone's links with the place where they live are "close enough and continuous enough", that is their home'.<sup>196</sup> At the core of this statement of principle is housing stability; home exists following sufficiently continuous links with a place formed over time.

It is useful to consider the decision from which the above principles emerge. *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139 illustrates the recognition of an individual's home interest pursuant to Victoria's *Charter*, in their dispute with a government 'public authority'.<sup>197</sup> Mr Warfa Sudi

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191 Ibid 226.

192 Ibid 203.

193 ICCPR (n 154) art 17: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'. See also, Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991) para 1.

194 An equivalent protection for home is also found in the *Human Rights Act 1998* (UK) ch 42 sch 1 art 8. See further Fox, *Conceptualising Home: Theories, Laws and Policies* (n 1) 451, which discusses the impact of article 8 on UK domestic law, including relevant case law.

195 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(1): 'A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. See also *Human Rights Act 2004* (ACT) s 12, which provides:

Everyone has the right –

not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

not to have his or her reputation unlawfully attacked.

196 *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, 146 [32] (citations omitted) (emphasis added). The Victorian Supreme Court of Appeal has referred to these principles with approval: see *PJB v Melbourne Health* (2011) 39 VR 373, 388 [57].

197 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4, 13(a), 38(1) requires 'public authorities' to afford a right to home (as do the statutory charters of rights existing in the Australian Capital Territory and in Queensland). As such, the reasoning discussed here, based on 'home', is unique to those jurisdictions with a statutory charter of rights. Also, 'public authority' includes the usual government entities and some non-government entities doing government like things. This is a gross

(originally a refugee from Somalia)<sup>198</sup> and his three-year-old son, Shire, had been living at Mr Sudi's mother's premises following her death. Mr Sudi had also lived at the premises, at times, before his mother's death.<sup>199</sup> The Director of Housing, as landlord, refused an application to transfer the tenancy to Mr Sudi (from his mother).<sup>200</sup> Nevertheless, and despite no formal tenancy with the Director of Housing, the Victorian Civil and Administrative Tribunal ('VCAT') found the premises were Mr Sudi's 'home'. He had established a sufficient connection to the premises, and the right to 'home' was engaged.

The upshot for the Director of Housing, of this finding, was that the *Charter* obligations, under section 38, to: (i) give 'proper consideration' to human rights; and (ii) act compatibly with human rights, both extended to the right to 'home' which was engaged here. The Director had not met the second of those obligations with respect to 'home', according to VCAT. The Director's decision to apply to VCAT for a possession order<sup>201</sup> was, therefore, itself incompatible with 'home'. It was an arbitrary and unjustified interference with 'home' under section 13(1) of the *Charter*. It was thus unlawful under the *Charter*. The Director declined to provide any justification for seeking a possession order,<sup>202</sup> leaving VCAT with no other option but to find the interference to 'home', caused by the Director's application for a possession order, could not be justified.<sup>203</sup> Justice Bell commented: 'If the director had chosen to offer submissions and

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oversimplification of the definition of 'public authority' in the *Charter*. However, it is all that is required for present purposes.

198 *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, 143 [7]–[8], [15].

199 *Ibid* 143–4 [10]–[19].

200 *Ibid* 143 [11]. The Tribunal noted: 'The application was refused by the director on 9 October 2003 on account of outstanding rental arrears. That was in breach of the relevant guidelines. If the guidelines had been properly applied, this controversy may have been avoided'.

201 The relevant power is contained in section 344(1) of the *Residential Tenancies Act 1997* (Vic), which provides that:

A person who claims to be entitled to the possession of premises may apply to the Tribunal for a possession order if—

- (a) the premises have been rented premises under a tenancy agreement at any time within the period of 12 months before the date of the application; and
- (b) the applicant alleges that the premises are occupied solely by a person (not being a tenant under a tenancy agreement) who entered into or remained in occupation without the applicant's licence or consent or that of any predecessor in title of the applicant.

202 *Director of Housing v Sudi (Residential Tenancies)* (2010) 33 VAR 139, 163 [114]:

[T]he director has offered nothing by way of justification for his interference with the human rights of Mr Sudi and his son. That course was deliberate. The director submits the tribunal has no jurisdiction to consider that question. Having failed to offer anything in justification of the interference, he accepts that, if the tribunal does have justification, he will be found to have acted in breach of human rights.

203 *Ibid* 165 [124]:

Seeking to evict Mr Sudi and his son, and making the application for a possession order under s 344(1), constituted a serious inference (sic) with their human rights to family and home under s 13(a) of the *Charter* ... As the director has failed to offer anything in justification of that interference, I am driven to conclude that taking such actions, and specifically making the application, breached those human rights and was 'unlawful' under s 38(1).

However, it should be noted that the Director likely gave no reasons because this case was a test case to determine VCAT's power to review decisions of the Director under the *Charter*, and thus not giving reasons directly prompted that issue.

evidence in justification for his actions, there would have been significant issues to consider'.<sup>204</sup> VCAT dismissed the Director's possession order application because the making of that application was *Charter*-incompatible with 'home'.

This decision demonstrates that the Director (and indeed all 'public authorities') must properly consider and not act incompatibly with 'home' – and the other rights protected – under the *Charter*.<sup>205</sup> That said, in *Director of Housing v Sudi* (2011) 33 VR 559, the Victorian Supreme Court of Appeal determined on appeal that VCAT itself did not have power to review – under the *Charter* – the Director's decision to apply for a possession order. As a result, *Charter* arguments must, for technical jurisdictional reasons, generally be heard in the Victorian Supreme Court, ie, they generally cannot be heard in the VCAT. The Court of Appeal held that VCAT did not have power to review, under the *Charter*, the Director's decision to apply for a possession order because: (i) VCAT does not have inherent judicial review jurisdiction,<sup>206</sup> and (ii) neither does VCAT have judicial review jurisdiction – in case of the residential tenancy legislation – under the administrative law principles of collateral review.<sup>207</sup>

The Court of Appeal, ultimately, remitted Mr Sudi's case to VCAT, for it to consider the possession order application of the Director of Housing, regardless of the right to 'home'. The Court of Appeal's decision means that – practically – public housing tenants challenging a proposed eviction by the Director of Housing on *Charter* grounds or under general administrative law must apply to the Supreme Court of Victoria. VCAT does not have jurisdiction to hear those

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204 Ibid 171 [155].

205 Section 38 of the Charter requires public authorities to: (i) give proper consideration to relevant rights; and (ii) act compatibly with human rights. The Director of Housing is a 'public authority' bound by the Charter, and thus the Director's decision to apply for a possession order will need to comply with section 38.

206 *Director of Housing v Sudi* (2011) 33 VR 559, 565 [24] (Warren CJ); 584 [126] (Weinberg JA).

207 Ibid 565 [24]:

An inferior court with no judicial review jurisdiction may still be able to entertain a collateral challenge to the validity of an administration decision. For example, in *Ousley v R* the High Court considered whether an accused in a criminal trial in the County Court can mount a collateral attack on the validity of a listening device warrant, in order to challenge the admissibility of recordings made through the listening device. Having found that the issuance of the warrant was an administrative act, the High Court held that the County Court trial judge was able to examine the validity of the warrant. The trial judge was able to do so despite the fact that the County Court was an inferior court with no judicial review jurisdiction.

See also at 572 [62]–[63] (Maxwell P); and at 607 [284] (Weinberg JA):

VCAT's jurisdiction is extremely broad. None the less, its powers are confined to those conferred upon it by statute, either expressly or by implication. There is nothing in the VCAT Act, or the RTA, or the Charter itself, that suggests that VCAT has the power to engage in broad-ranging collateral review on Charter grounds.

Subsequently, in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 108 [36] ('*Breckler*'), the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that:

[I]n the absence of legislative prescription to the contrary, [an administrative decision] would be open to collateral review by a court in the course of dealing with an issue properly arising as an element in a justiciable controversy of which the court was seized.

*Ousley v The Queen* and *Breckler* make it clear that administrative decisions can generally be collaterally challenged in a court, but the scope of permissible collateral challenge remains a matter of some controversy.

*Charter* arguments, based on the right to ‘home’. The Supreme Court is an expensive and complex jurisdiction, and hence, from the perspective of plaintiffs, this is a much less amenable way in which to raise the *Charter*. However, the Court of Appeal’s decision is about the correct choice of forum in which to bring a *Charter* claim. It does not change the law that, as noted, the Director must properly consider, and not act incompatibly with, ‘home’ under the *Charter*.<sup>208</sup>

## B Housing Control

Another very important condition for home is housing control. Housing control refers to the ability to control the home space in terms of what alterations or improvements might be made to it. Housing control, in this sense, is clearly relevant to home. Individuals who can make alterations or improvements to the home space (ie, who have housing control) are better able to express identity through these creative endeavours.<sup>209</sup> Conversely, individuals who cannot engage in such endeavours (ie, who lack housing control) are less able to experience home as identity. Ruonavaara explains: ‘Residents actively *make* dwellings homes by redesigning, decorating, and changing them according to their values and wishes. As different housing tenures invest residents with different degrees of power [ie, housing control] over their living space, tenure may also be relevant for homemaking. If one’s housing tenure gives little say over the living space, it may not be easy to feel at home in it’.<sup>210</sup> Individuals lacking housing control in Australia are, most typically, leasehold owners. However, leasehold owners need not lack housing control, with appropriate residential tenancy laws, as discussed below in Part IV.

Housing control also refers to the ability to control the home space in terms of deciding who can enter one’s home, and the length of their stay. Research has shown that without such housing control an individual is unlikely to feel secure in their home.<sup>211</sup> Housing control is thus also relevant to the experience of home as a feeling of security.

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208 See above n 205.

209 Easthope (n 6) 582, 593.

210 Hannu Ruonavaara, ‘Tenure as an Institution’ in Susan Smith (ed), *International Encyclopaedia of Housing and Home* (Elsevier Science & Technology, 2012) 185, 186, quoted in Easthope (n 6) 583.

211 Sebba and Churchman (n 58) 9–10:

In general the home is the sole, exclusive area of control for an individual. It answers the need for a space of one’s own, a space over which others have no jurisdiction. Since it is under the individual’s control, the home permits the individual to act freely, to supervise others within it, to control the everyday routine, etc. This aspect was most frequently mentioned by fathers and children, second in frequency by mothers. The adults stressed the spatial control and the social supervision that the home affords its owners (eg, ‘In my home I decide who comes and goes’; ‘In my home I decide upon the daily schedule’), whereas children stressed the freedom of behaviour that the home affords them (eg, ‘At home, I can eat whenever I want’ ... ‘At home I’m not ashamed to ask for what I want’; ‘At home I can run wild’) ... Thus, the home fills the need of 72% of those interviewed to control a physical area; this control is a condition for freedom of behaviour, for self-expression and for a feeling of security.

## C Other Conditions

Other conditions are also important to the experience of home, many of which have little or nothing to do with law. First, individuals need a foundational desire to make a home.<sup>212</sup> This is a preliminary condition. Other conditions might include: culture, built environment, and prevailing social and economic conditions. Achieving home is thus complex, as further discussion of these conditions, below, shows. Further, as many of these conditions are outside the full control of law, it becomes clear that law cannot, by itself, ensure home.<sup>213</sup>

### 1 Culture

Culture is also a component in producing the experience of home. This must be the case or why else would individuals incorporate cultural features into their housing designs?<sup>214</sup> Porteous explains: ‘Emigrants try to reproduce home’.<sup>215</sup> ‘The former British Empire is cluttered with attempts to reproduce the ambience of charming Cotswold villages, an effort most notable in the hill stations of India. Such efforts were also made in settlement colonies such as Canada. In response to her father’s creation of an English garden-scape in the midst of the mid-nineteenth century British Columbia wilderness, the painter Emily Carr observes: “It was as if Father had buried a tremendous homesickness in this new soil”’.<sup>216</sup> Home, in these cases, is being drawn from the ‘place of domicile’.<sup>217</sup>

Culture is a component in producing home in other ways. Particularly, local culture might influence perceptions of tenure type.<sup>218</sup> Freehold ownership might be perceived, by the culture, as necessary to experience home, with the concomitant view that home is not possible under leasehold tenure. Bate explains ‘the meaning and making of home is often concomitant with homeownership’.<sup>219</sup>

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212 ‘Simply put, the process of constructing home in an apartment requires the choice to do so. The individual tenant must be willing to make the apartment into a home in order for the process to succeed’: Fowler and Lipscomb (n 130) 112.

213 Ben Travia and Eileen Webb, ‘Can Real Property Law Play a Role in Addressing Housing Vulnerability? The Case of Older Women Experiencing Housing Stress and Homelessness’ (2015) 33(2) *Law in Context* 52, 55.

214 Fox O’Mahony (n 25) 165.

215 Porteous (n 67) 387.

216 Ibid.

217 Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 2) 600. See also Moore (n 113) 208.

218 ‘[F]eelings about renting and owning are culturally specific and not innate’: Atkinson and Jacobs (n 85) 41; refer to the debate around whether a ‘lack of control’ in renting is intrinsic to the tenure, or because of ‘prevailing cultural norms about renting being an inferior, and inherently transitory form of occupancy’: Hulse, Milligan and Easthope (n 91) 2; ‘The homeownership ideology is by now deeply entrenched in the housing folklore, as well as in the housing policies of most capitalist societies. Indeed, so much is this so that there is very little likelihood that tenure-neutral housing policies will ever replace the current homeownership policies in most countries, at least in the near future’: Jim Kemeny, *The Great Australian Nightmare: A Critique of the Home-Ownership Ideology* (Georgian House, 1983) 275, quoted in Atkinson and Jacobs (n 85) 22.

219 Bronwyn Bate, ‘Understanding the Influence Tenure Has on Meanings of Home and Homemaking Practices’ (2018) 12(1) *Geography Compass* 1, 1–2.

Evidence of this exists in Australia, for example, in the comments of former Treasurer Peter Costello:

But young Australians and older Australians too, still aspire to home ownership. Why? Because it gives them a security in life, a security that gives them a little piece of our country. It is a bit like “The Castle”, their little piece of turf they can defend against all comers and gives them security and their family security. And we should encourage and nurture homeownership. This is something that is important not just in an economic sense but also I believe in a social sense.<sup>220</sup>

Whether the desire for home ownership (ie, freehold ownership)<sup>221</sup> is culturally motivated by perceptions it is a superior tenure, or reflects differences between the tenures, is a question housing scholars debate. Ronald’s view is that culture is the reason for the home ownership preferences: ‘[H]ome ownership demand is primarily the result of discursive processes and policy development rather than a “natural” phenomenon’.<sup>222</sup> Saunders’ view, by contrast, is that demand for home ownership reflects differences between the tenures (these differences, in his view, mean that home ownership provides more ‘ontological security’ than leasehold).<sup>223</sup>

## 2 Built Environments

Built environment – that is, the surroundings and aesthetics of housing – are another factor in creating home.<sup>224</sup> Built environment changes have been made which, according to Dovey, are not conducive to home.<sup>225</sup> Modern heating appliances are one example given. These have replaced the hearth fire and, in the process, ‘certain intangible meanings’ might have been lost,<sup>226</sup> with the hearth considered ‘a symbol of home’, ‘a sacred center’, ‘an anchor for social order’ and ‘a place of reverie’.<sup>227</sup> Declining communal, open spaces are another built environment change.<sup>228</sup> These spaces are important to a ‘broader sense of home extending into community life’.<sup>229</sup> Without these spaces, ‘the experience of home contracts and loses meaning; yet at the same time increased demands are placed

220 Peter Costello, ‘Launch of the Great Australian Dream Project’ (Speech, House of Representatives Alcove, 14 August 2006), quoted in Richard Ronald, *The Ideology of Home Ownership: Homeowner Societies and the Role of Housing* (Palgrave Macmillan, 2008) 160–1.

221 See above n 11 and accompanying text.

222 Ronald (n 221) 162. See also, ‘Our research shows how ontological security derives in part from the avoidance both of risk and of the appearance of failure. More so than the bypassing of shame, owner occupation offers the benefits of ontological security due partly to a rosy association of the tenure with stability (something which is often not true), and due to a strong desire to enter the mainstream and demonstrate personal progress – something which renting (private or public) is largely incapable of doing’: Hiscock et al (n 85) 63.

223 ‘Because owners enjoy a different set of rights from those enjoyed by tenants, it follows that people may well aspire to one tenure rather than the other simply because they want rights, such as the right of disposal, which are guaranteed by one but not the other’: Saunders (n 10) 98.

224 Dovey (n 2) 51–8: six properties ‘have eroded the traditional sense of home and that paralyze its reemergence’: (1) Rationalism and Technology; (2) Commoditization; (3) Bureaucracy; (4) Scale and Speed; (5) The Erosion of Communal Space; and (6) Professionalism.

225 Ibid 51.

226 Ibid 52.

227 Ibid.

228 Ibid 57: ‘the decline of communally shared open space’.

229 Ibid 58.

upon this depleted experience of home'.<sup>230</sup> Porches and sidewalks are a further example of communal spaces which are disappearing. The overall point, usefully put by Taylor and Brower, is that '[h]ome does not end at the front door but rather extends beyond',<sup>231</sup> and '[l]inking home to the community, and at the same time buffering home from the community, are home and near-home territories'.<sup>232</sup>

Dovey gives, as reasons for these changes to built environment undermining home, 'rapid advances in technology',<sup>233</sup> the architecture profession's focus on outward (rather than inward) appearance,<sup>234</sup> top-down bureaucracy far removed from individuals' experiences of home,<sup>235</sup> and scale and speed.<sup>236</sup>

### D Social and Economic Conditions

Social and economic conditions can also impact home. Atkinson and Jacobs explain:

Economic conditions or change in individual circumstances can dramatically affect our view of home. For example, if we lose our job and struggle to meet the mortgage payments, our view of home can radically alter. Rather than being our prized asset, the cost of servicing a mortgage debt can change the way we feel toward our home. Our feelings of the home can also be transformed following a dramatic event, such as a split relationship or children leaving the family home. Even a long journey or for migrants a trip to their former home may alter feelings of home.<sup>237</sup>

Policies of government on employment, social housing and social security will be very relevant in this sense, in that they will impact individuals' economic circumstances and hence possibly their experience of home.<sup>238</sup>

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230 Ibid.

231 Ralph B Taylor and Sidney Brower, 'Home and Near-Home Territories' in Irwin Altman and Carol M Werner (eds), *Home Environments* (Plenum Press, 1985) 183, 183.

232 Ibid 210.

233 Dovey (n 2) 52.

234 Ibid 58: designers are concerned 'with the image' whereas the experience of home is about "'living in" rather than "looking at" buildings'. Dovey thus 'draw[s] attention to the ways in which it [the designer's role] may be antithetical to the process of becoming-at-home'. In essence, '[a] home cannot be someone else's work of art'.

235 Ibid 55–6: 'The complexities of the experience of home and the role of the dweller in achieving it are beyond the capabilities of bureaucratic structures to deal with'. The point being made is that top-down bureaucratic approaches might conflict with the uniqueness of a particular individual's relationship to their dwelling, and thus undermine their experience of home.

236 Ibid 56–7:

Traditional cities and villages for which our culture is so often nostalgic were not produced from master plans but grew piecemeal over a long period of time, responding to circumstances at a local level. The phenomenon of home, too, grows piecemeal rather than being created complete. Swiftly implemented large developments may lend the impression of solving large-scale problems, yet they do so at the expense of the adaptability and identification possession when we understand the processes by which houses can grow as families grow – as economic resources permit and as needs arise.

237 Atkinson and Jacobs (n 85) 41.

238 Hulse, Milligan and Easthope (n 91) 6–11: whether or not tenants have available to them 'tenant support programs' can impact on home. See also Janet Ford, Roger Burrows and Sarah Nettleton, *Home Ownership in a Risk Society: A Social Analysis of Mortgage Arrears and Possessions* (The Policy Press, 2001) 8:

## E Concluding Remarks

The above factors are all potentially in the mix, determining the experience of home had by individuals. Conditions discussed in detail were housing stability and housing control. This is because these are conditions law – and Australian real property law in particular – can significantly impact. It thus makes sense, therefore, that these conditions be elevated in the discussion. Other conditions were also discussed briefly: culture, built environment and prevailing social and economic conditions. These were discussed to demonstrate the complexity of home and, further, that law cannot ensure home as there are conditions such as these which are not entirely within its control.

## IV RELEVANCE OF TENURE TYPE

Tenure type is another factor which some scholars see as relevant to the experience of home. It is discussed separately, in this Part, because there are significant policy implications to be drawn out, and because the article argues that tenure type is not, and should not be, a condition for home. Rather, home – as experience – should be available under both tenures.

### A Distinguishing the Tenure Types

Tenure describes, at a basic level, the nature of ‘the legal claim we have to a particular dwelling’.<sup>239</sup> Further, in this article ‘tenure’ is used in its technical legal sense to refer to freehold tenure (comprised of three forms: the fee simple absolute estate, the freehold life estate and the fee tail estate)<sup>240</sup> and the leasehold estate (although historically leasehold was not a tenure per se). These are the two tenures recognised in law.<sup>241</sup>

In Australia, therefore, there are two housing tenures: freehold ownership and leasehold ownership.<sup>242</sup> Within these, there are different forms of each type of

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It is also clear that in discussing the risks to home ownership from social and economic restructuring we are identifying processes that are sometimes also constituted by public policy – for example, housing policy, policy on labour market regulation and social security policy. The potential and actual consequences of these risks are thus public issues, although they are also experienced as personal troubles.

239 Atkinson and Jacobs (n 85) 11.

240 Fee tail estates generally no longer form part of Australian land law, in that it is no longer possible to create fee tail estates in New South Wales, Queensland, Western Australia, the Northern Territory, Victoria, or Tasmania (in respect of Torrens system land). However, fee tail estates may, in theory, still exist; for example, in Victoria which has not converted existing fee tail estates (if any exist) to fee simple estates, and in South Australia: see Edgeworth et al (n 9) 180–1 [3.14]; Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Final Report No 20, October 2010) 80–2 [6.1]–[6.18].

241 The word ‘tenure’ is sometimes used differently, ie, to refer broadly to any proprietary interest in land, but that is not how it is used in this article.

242 Hulse (n 4) 210; ‘there are basically only two types of housing tenure in modern societies – owner occupation and renting – which are distinguished by qualitatively different modes of possession of

tenure. Within freehold ownership, for example, there exists the fee simple absolute estate, which continues indefinitely until devised to another person, and the freehold life estate, which continues until the death of the interest holder. Within leasehold ownership, for example, there exists ordinary residential tenancies, which are regulated by statute,<sup>243</sup> and protected tenancies, which continue for an indefinite duration of tenure based on statutory protections for those tenants.<sup>244</sup> Under each tenure, the form of title also impacts on the rights under each tenure.<sup>245</sup>

It is such different legal rights of occupiers under the different forms of tenure which distinguish them from each other.<sup>246</sup> The different legal rights offer different levels of control and stability to occupiers, and so varying experiences of home. Different rights also mean the experience of home is also likely to be different under each type of tenure.<sup>247</sup>

## B Which Tenure Is Better for Home?

In Australia, the different rights enjoyed under freehold ownership<sup>248</sup> mean that owners of this tenure might experience home in ways that leasehold owners do not, to the same extent. However, to this must be added an important qualification, making clear the argument advanced by this article: all occupiers – under leasehold or freehold ownership – are, theoretically speaking, capable of experiencing home. Neither tenure outright precludes housing stability, nor housing control, and hence neither precludes home. Studies reflect that individuals do not need to own property to experience home. A study has shown that communards, for example, can still feel at home.<sup>249</sup> This should create optimism for the experience of home, for it means that home need not be experienced in an *overly* discriminatory way between tenure types. That said, in the Australian context, the different rights under freehold ownership might make it more conducive to home than leasehold. The rights under leasehold ownership

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housing as indicated by the rights of disposal, of use (particularly security) and of control (eg, in altering the dwelling)': at 204.

243 See *Residential Tenancies Act 1997* (Vic).

244 Refer to discussion of protected tenancies in Part III above.

245 Strata title, for example, offers less control than ordinary freehold title. Strata title is characterised as the sharing of common property between all lot owners, and so the owners' rights of control are thus limited in that regard. Strata title can be under freehold or leasehold tenure. On strata title, see further Sherry (n 4).

246 Saunders (n 10) 98–9:

Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognised as a necessary component to any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

247 Ibid 274: 'Does this mean that ownership can provide a sense of personal security, identity and autonomy which may be denied to non-owners? Put another way, does private ownership generate greater scope for the expression of self and identity in a private realm?'

248 That is, ownership of the fee simple absolute estate. See above n 11.

249 Elena Ariel Windsong, 'There Is No Place Like Home: Complexities in Exploring Home and Place Attachment' (2010) 47(1) *The Social Science Journal* 205, 212.

in Australia<sup>250</sup> do not parallel those under freehold ownership. The article does not deny this point, now explored.

## C Different Rights

### 1 Duration of Tenure

Duration of tenure is the first key difference between the tenures.<sup>251</sup> Duration of tenure under leasehold ownership is typically for a fixed duration,<sup>252</sup> and in Australia this duration is for a relatively short period of time. Duration of tenure under freehold ownership is, by contrast, ‘for as long as title is held’<sup>253</sup> or, in other words, for an indefinite duration. This difference makes freehold ownership more stable than leasehold ownership, in the Australian context. The indefinite duration<sup>254</sup> of freehold ownership can ensure permanence, ‘even across generations’.<sup>255</sup> How is this relevant to home as an experience? Well, put simply, this can enhance home – feelings of security, self-expression, and relationships built over time – under freehold ownership. Saunders’ research concludes that freehold owners ‘are more likely to see the home as a place where they can relax and “be themselves”’.<sup>256</sup> Feelings of security are, thus, greater for freehold owners.<sup>257</sup> And the opposite has been shown to be true for leasehold owners. Dupuis and Thorns’ research shows that leaseholders feel less secure than freehold owners. Having conducted interviews, they explain ‘renting was generally seen as much more of a risky business with vulnerable tenants subject to the whims of the landlord and eviction a constant fear’.<sup>258</sup> The difference between the tenures was characterised by one interviewee in this way: ‘When you own you know you’re not going to get the rug whipped out from under you. In a rental property, in one minute and out the next’.<sup>259</sup> This characterisation

250 Comments here are with respect to leasehold ownership of residential property in Australia.

251 Saunders (n 10) 98–9:

Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognised as a necessary component of any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

252 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, 388. However, there are exceptions. Protected tenancies — discussed in Part III above — are such an exception, whereby the legislature effectively made the lease term indefinite by force of statute, for the benefit of these tenants.

253 Saunders (n 10) 99.

254 Saunders (n 10) 98–9:

Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense they are normally recognised as a necessary component to any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

255 Saunders (n 10) 311.

256 Peter Saunders, ‘The Meaning of “Home” in Contemporary English Culture’ (1989) 4(3) *Housing Studies* 177, 188.

257 Of course, this will not always be the case. For some people home ownership is economically unsustainable. This is a different case altogether and means that for those people freehold ownership is unlikely to enhance home. See further Fox O’Mahony (n 25) 162; Ford, Burrows and Nettleton (n 238) 9, 151.

258 Dupuis and Thorns (n 79) 31.

259 Ibid 32.

could apply equally in Australia, where differences in the duration of tenure mean that freehold ownership generally provides greater security than under leasehold. Indeed, leasehold owners of residential property in Australia occupy their house for a relatively short duration, and on terms favourable to their landlord's ability to terminate their tenancy.<sup>260</sup>

Freehold ownership might also enhance the expression of identity, again because it is typically more stable. A longer duration of residence is more conducive to the development of self-identity in a place and that is why freehold ownership, with its indefinite duration, is better in this regard. Saunders states: 'tenants are less able than owners to express sense of self and belonging through their houses. They can identify with their families and neighbours but not with the house. This has nothing to do with the building itself, but is a function of tenure'.<sup>261</sup> Cuba and Hummon similarly explain: '[L]ong-term residence also contributes to place identity, particularly in building sentimental attachment and a sense of home. Duration of residence not only enhances local social ties, but it also provides a temporal context for imbuing a place with personal meanings'.<sup>262</sup>

An important qualification is that leasehold ownership does not preclude the feeling of security or self-identity or close relationships in a place. Leases can potentially provide necessary stability and control, leading to the home experience of security, self-identity and close relationships in a place. Mee's study of public housing tenants in Newcastle, New South Wales, shows this regarding security: '[M]ost tenants felt "at home" in public housing in ways that extended beyond the simple provision of a dwelling, to feelings of security, comfort and control'.<sup>263</sup> With greater housing stability than private tenants, public housing tenants had significant security according to this study.<sup>264</sup> The same can be said of those individuals occupying under a protected tenancy, as discussed in Part III.

For present purposes, this indicates that leasehold owners need not be insecure (or, similarly, feel inhibited in their ability to express identity in a place). Whether they feel so depends significantly on deliberative choices made by government, particularly in constructing rental laws in particular ways and distributing rights between landlords and tenants. Leasehold ownership can thus provide stability, security and self-identity. Whether or not it does so, however, depends on appropriate rental laws being developed for private tenants. They should enjoy more legal security, as for the public housing tenants in Mee's

260 See generally Chris Martin, 'Improving Housing Security through Tenancy Law Reform: Alternatives to Long Fixed Term Agreements' (2018) 7(1) *Property Law Review* 184.

261 Saunders (n 10) 294.

262 Lee Cuba and David M Hummon, 'A Place to Call Home: Identification with Dwelling, Community, and Region' (1993) 34(1) *The Sociological Quarterly* 111, 115.

263 Kathleen Mee, "'I Ain't Been to Heaven Yet? Living Here, This Is Heaven to Me": Public Housing and the Making of Home in Inner Newcastle' (2007) 24(3) *Housing, Theory and Society* 207, 225. Residents of share houses in Inner Sydney also have positive home experiences: see McNamara and Connell (n 131) 88.

264 The contrast between public and private tenants, with the latter having a more precarious housing experience, was particularly noted: *ibid* 225.

study, which shows broadly that the conditions under leasehold ownership can be conducive to home (and are not inhibited by leasehold tenure itself). There is, accordingly, much scope to ensure home for leaseholders (and freeholders alike).<sup>265</sup>

This view understands the differences between tenures in Australia to arise not from inherent differences between the tenures themselves, but, rather, from Australian laws (and practice) which can thus be changed appropriately for home, if deemed necessary.<sup>266</sup> There are no inherent differences which make freehold ownership a superior tenure to leasehold ownership for the purposes of home, but only laws and policies which create this result.

## 2 Control

Rights of control are another difference between freehold and leasehold ownership.<sup>267</sup> Examples include the rights to control who has access and to make alterations.<sup>268</sup> Leaseholders' rights of control, such as these, are 'much attenuated' under leasehold according to Saunders,<sup>269</sup> and the same comments generally can apply in Australia. Leases of residential property in Australia, for example, typically require tenants to grant access for landlord inspections, not to make unauthorised alterations, and otherwise to maintain the premises. Freehold owners, by contrast, are under no such restrictions, although restrictions can arise otherwise, for example through planning laws.<sup>270</sup> Freehold ownership, therefore, more closely accords with 'that sole and despotic dominion', famously referred to by Blackstone.<sup>271</sup>

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265 It is useful to recall Kemeny's distinction between two types of rental systems in this context. Kemeny distinguishes between dualist and integrated rental systems. In dualist rental systems – of which Australia's is one – a clear distinction exists between public housing and private renting as to their terms of occupation. In integrated rental systems, by contrast, no such distinction exists. The distinction demonstrates that governments can determine the strength of rights afforded to tenants. See especially Jim Kemeny, *From Public Housing to the Social Market: Rental Policy Strategies in Comparative Perspective* (Routledge, 1995); Jim Kemeny, Jan Kersloot and Philippe Thalmann, 'Non-profit Housing Influencing, Leading and Dominating the Unitary Rental Market: Three Case Studies' (2005) 20(6) *Housing Studies* 855; Jim Kemeny, 'Corporatism and Housing Regimes' (2006) 23(1) *Housing, Theory and Society* 1.

266 In terms of appropriate legal change, long-term leases are often thought of as a way to provide tenants with greater stability (and hence security). However, this perspective has been challenged by Martin, who argues that long-term leases would not assist tenants and that (instead) tenancy laws should be changed to limit the grounds on which landlords can end leases (thus providing tenants with greater security in this way): see Martin (n 260) 184.

267 Saunders (n 10) 98–9:

Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognized as a necessary component of any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

268 Rights to control, access and alterations are discussed in Saunders (n 10) 100–1.

269 Ibid 99.

270 Ibid 98.

271 William Blackstone, *The Commentaries on the Laws of England: A Reprint of the First Edition with Supplement* (Dawsons of Pall Mall, 1966). However, there are forms of freehold ownership which less resemble 'sole and despotic dominion'. Strata title falls into that category, in that strata title owners are

Turning to how all this impacts on home, leaseholders' 'attenuated' rights of control arguably inhibit their ability to manifest self-identity in home. Not being able to make certain alterations at all, or without permission, arguably has this effect.<sup>272</sup> Freehold owners, by contrast, generally 'have more freedom to alter those features of the dwelling that dissatisfy them'.<sup>273</sup> Thus they have the ability to express their identity through the possibility of modifying their environment and thus stamping their personality on their home. One respondent described her home as: '...a personal possession which has the stamp of your identity'.<sup>274</sup> Of course, leaseholders might be able to make some alterations (and have some rights of control). However, these are currently to a lesser extent in Australia than under freehold ownership. Residential tenancy legislation applicable in Australia restricts what tenants can do with their dwelling.<sup>275</sup> That probably reflects the practical reality that residential leases in Australia are for a relatively short duration, and thus Australian landlords have a more immediate interest in retaining control over the premises which might not arise if the tenancy were for a much longer duration.<sup>276</sup>

While this article agrees that Saunders' characterisation of differences between the tenures applies generally with equal force in Australia (and thus has been used to inform the discussion above), it is wary of a further related contention of Saunders that 'the rights of non-owners can never come to balance those of owners'.<sup>277</sup> This contention says that leasehold ownership is granted out of freehold ownership, ie, the fee simple estate, and thus leasehold ownership must therefore, always (to some extent) be subject to freehold ownership. It would not make sense, for example, for a leasehold owner to be permitted to make any desired alterations. This would eviscerate the freehold owners' rights.<sup>278</sup>

The article prefers to emphasise (instead) that there is much which could be done to strengthen the rights of leaseholders in Australia, such that their experience of home can come more to balance that of freehold owners. An

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subject to by-laws that restrict the owner in what they can do with their property (both as regards their private lot and common property). On strata title by-laws, see especially Sherry (n 4).

272 Even where not restricted, tenants 'are usually reluctant to spend large amounts of money on a rented dwelling': Luis Diaz-Serrano, 'Disentangling the Housing Satisfaction Puzzle: Does Homeownership Really Matter?' (2009) 30(5) *Journal of Economic Psychology* 745, 747.

273 Ibid.

274 Dupuis and Thorns (n 79) 38.

275 See *Residential Tenancies Act 1997* (Vic) s 64(1): 'A tenant must not, without the landlord's consent — (a) install any fixtures on the rented premises; or (b) make any alteration, renovation or addition to the rented premises'. However, Victoria has recently amended its residential tenancy laws to provide leasehold owners with power to make 'minor modifications', without the landlord's consent.

276 See Martin, who challenges the perspective that long-term leases would assist tenants and (instead) suggests that tenancy laws should be changed to limit the grounds on which landlords can end leases (thus providing tenants with greater security in this way): Martin (n 260) 184.

277 Saunders (n 10) 100.

278 Ibid: 'no landlord can afford to offer a *carte blanche* for its property to be altered without prior permission'.

appropriate balance between landlords' and tenants' rights is achievable by legislation.

So, the acknowledgement in this article – that freehold ownership is typically superior in Australia, because of superior rights of control – comes with an important override. None of this precludes leaseholders from the experience of home as self-identity. Through law reform, it is possible to ensure leaseholders can express their identity in a place, even if that is not to the same extent as freehold owners.<sup>279</sup> Laws can be made by government to enable leasehold owners to manifest self-identity in home, as recent reforms in Victoria demonstrate. These reforms, to that state's residential tenancy legislation, provide leaseholders with greater control over leased premises, including to keep a pet and make minor alterations without the landlord's permission.<sup>280</sup>

### 3 *Ability to Dispose*

The ability to dispose of the house is another difference between housing tenures,<sup>281</sup> including in Australia.<sup>282</sup> The right to dispose of their interest is a right freehold owners have. What this means is that freehold owners can realise, in monetary terms, the value of the house through disposal of the asset. Leaseholders – theoretically – also have a right to assign their interest. However, Australian leaseholders cannot practically exercise that right in exchange for financial gain. The short duration of their residential tenancy makes it commercially unappealing, albeit that a right to assign it exists.<sup>283</sup> This difference means that, again, freehold ownership might provide a superior home experience. Freehold owners might derive additional security knowing their homes are a financial investment that can be sold (and which will likely appreciate in value).<sup>284</sup> Freehold owners might also be more inclined to invest their identity in a home because they 'own' the house, and will be able to realise the value of any improvements through its disposal.<sup>285</sup> Leaseholders in Australia do not benefit in either way; they do not derive financial security because they cannot (commercially and practically speaking), as noted, assign their interest in the house for financial gain, and in turn this might make them reluctant to improve (and so manifest their identity in) the house. Diaz-Serrano explains that

279 Tenants can also make a home through 'acts of possession', where self is reflected in possessions rather than the physical house itself: Fowler and Lipscomb (n 130) 107–8.

280 See *Residential Tenancies Amendment Act 2018* (Vic). Victoria passed over 130 reforms to that Act under the *Residential Tenancies Amendment Act 2018* (Vic).

281 Saunders (n 10) 98–9:

Nevertheless, there are certain broad rights which may be deemed essential to ownership in the sense that they are normally recognized as a necessary component of any claim to title. Minimally these may be identified as the right to exclusive use and benefit for as long as title is held, the right to control and the right to dispose.

282 Refer to relevant discussion in Part II.

283 Real property law contains fundamental rules against restraints on alienation.

284 Bright and Hopkins (n 25) 382–3: 'Ultimately, ownership of value brings the prospect of financial security'. And at 386: 'The overarching financial benefit of home ownership is the prospect of financial security: a long-term reduction in housing costs coupled with the safety of a foot on the housing ladder'.

285 Saunders (n 10) 303: giving the example of Council tenants who enter into ownership and thus change various aspects of their housing immediately on become freehold owners.

leaseholders 'are usually reluctant to spend large amounts of money on a rented dwelling'.<sup>286</sup> Saunders also makes the point: '[M]any tenants feel unwilling or unable to perform such labour on a house which they constantly remember is not their own'.<sup>287</sup> Again, this is not the result of inherent differences between the tenures. Rather, it is the result of Australian residential leases being for a relatively short duration, and hence commercially unappealing as an asset.<sup>288</sup>

### **D Two Critical Policy Implications**

Two critical policy implications flow from home being a potentially superior experience under freehold ownership in Australia because of its greater stability and control. The first critical policy implication is that home ownership – of the freehold – ought to be realisable for as many Australians as possible. Particularly, laws should support home ownership of that tenure over investment in it solely for financial gain. Unfortunately, Australian laws exist which prefer investors seeking to acquire homes in pursuit of financial gain. Those laws provide tax concessions to Australian investors in residential property, and thus seem to go against the flourishing of aspiring owner-occupiers seeking (a house for) home.<sup>289</sup> The argument for policies supporting home ownership follows from the overall conclusion above: that home ownership under freehold tenure is desirable for its ability to realise home,<sup>290</sup> in a potentially superior way to leasehold, through its legal features discussed.<sup>291</sup>

The second critical policy implication is that appropriate residential tenancy laws should be developed to ensure leasehold owners can also experience home. Victoria has begun to make leasehold more stable and conducive to home under its residential tenancy legislation.<sup>292</sup> However, it could be said there is a general need to 'rehabilitate renting'<sup>293</sup> in Australia, because existing tenancy laws do not go far enough in ensuring home for leaseholders. This argument, for supporting home for leaseholders, follows from the conclusion above that leasehold does not

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286 Diaz-Serrano considers that even where tenants can make improvements, 'they are usually reluctant to spend large amounts of money on a rented dwelling': Diaz-Serrano (n 272) 747.

287 Saunders (n 10) 302.

288 This is noted here because it might impact on the experience of home derived under each type of tenure. However, it should not be taken that this article is thus in support of long-term residential tenancy agreements in Australia. On that point, see Martin (n 260).

289 Owner-occupiers in Australia also receive a tax concession for their 'main residence' (ie, a capital gains tax exemption). However, this obviously does not assist non-owners.

290 'Because owners enjoy a different set of rights from those enjoyed by tenants, it follows that people may well aspire to one tenure rather than the other simply because they want rights, such as the right of disposal, which are guaranteed by one but not the other': Saunders (n 10) 99.

291 Although recent Australian governments have demonstrated a focus on the objective of stimulating investment in residential property, for much of the 20<sup>th</sup> century Australian governments sought to encourage home ownership by young Australians. 'The ideology of home ownership has been a central component shaping policies and practices in such countries as Britain, Australia, New Zealand and Canada': Dupuis and Thorns (n 79) 24.

292 See n 280.

293 'A more effective strategy may be to rehabilitate renting and reverse the discursive prejudices that have built up against it': Ronald (n 220) 253.

preclude home,<sup>294</sup> albeit that it might not (currently in Australia) be as conducive to home as freehold ownership. Leasehold is not inherently unstable and does not preclude leaseholders having some level of control,<sup>295</sup> should policymakers choose to ensure this in law.

## V CONCLUSION

This article has been concerned with home in the housing context. It began by establishing a particular understanding of home as an experience. It then set out conditions necessary to attain home in law. Three key points have emerged. First, home is an experience separate from the physical structure of house. Included in that experience, ideally, is the feeling of security, the expression of identity, and relationships and family; all are necessary to human flourishing. Secondly, housing stability and housing control are essential conditions which laws should embody to ensure this experience called home. Stable housing underpins the feeling of security and self-expression, as well as relationships and family. The feeling of security results from individuals knowing they can stay in a place.<sup>296</sup> Self-expression and identity can also more easily occur over time, with memories then forming. Housing control is also essential to home, both to self-expression and identity, and to feeling secure. An appropriate level of control over home, for example, the ability to make alterations, facilitates creative self-expression, and housing control over who enters the dwelling space enhances the feeling of security. Thirdly, home can be realised regardless of housing tenure. However, freehold ownership of the fee simple absolute estate might be more conducive to home in Australia presently as compared to leasehold because of legal differences. Two critical policy implications flow from this. First, laws should support home ownership – of the freehold – for those who seek it for home over investment for financial purposes. Housing is unique in providing the place for home. Meanwhile, there are various other vehicles for investment purposes. Secondly, laws should also ensure home for leasehold owners. Leasehold tenure itself is not inherently unstable or unable to provide housing control. If it is unstable or lacks housing control, this is because of other conditions – social, economic and legal – which make it so, and which may need to change.

Regarding future research, it is suggested that the conditions for home set out herein might be used to evaluate laws' impact on home. Do any laws perpetuate an inferior experience of home, for some groups of people because they

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294 'To suggest that home ownership creates ontological security does not entail denial of the possibility that non-owners may seek and achieve an equivalent sense of security through other channels. ... the fact that home ownership enables ontological security does not mean that non-ownership prevents it': Saunders (n 10) 303.

295 It is only that *in comparison to* freehold ownership, leasehold in Australia is less stable and thus less conducive to 'home'.

296 As this article suggests, home as security is an important counterbalance to the growing problems of anxiety and other mental unwellness present in Australian society.

undermine these conditions? If so, how ought they be changed? Areas of Australian law which could usefully be examined from the perspective of home include migration law, repossession law, residential tenancy laws and public housing, equal opportunity laws and strata title laws.<sup>297</sup> Research exists in some of these areas overseas,<sup>298</sup> but the field remains comparatively open in Australia. Appropriate policy responses could usefully be developed in these areas to enhance home – the experience – in Australia.<sup>299</sup>

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297 Regarding strata title, see Sherry (n 4).

298 On migration, see Fox O'Mahony and Sweeney (n 18). On repossession law, see Beverley A Searle, 'Recession, Repossession and Family Welfare' (2012) 24(1) *Child and Family Law Quarterly* 1.

299 As Fox notes, the home perspective advances law through 'the possibilities for developing new thinking ... from a person-centred perspective': Fox O'Mahony and Sweeney (n 18) 290.