

# The Contemporary Commons: understanding competing property rights

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**Abstract:** The city comprises a milieu of competing and complementary property rights, ranging from the individual to the communal. Whilst property rights provide a coherent legal, economic and social framework for the relationship between people, place and property, they are often misunderstood and misinterpreted by the multiplicity of stakeholders sharing the space that is the contemporary metropolis. The competing demands and expectations on space, exacerbated by the needs of urban consolidation in the evolving Australian cityscape, add to the confusion.

The heterogeneous nature of the commons, both in composition and extent in different urban contexts, is discussed as a central issue in competition for property rights. The paper explores frameworks for identifying appropriate divisions between individual property rights and those of communities and society in general. It also discusses the appropriateness of controls, markets, voluntary agreement and other mechanisms for allocating property rights in urban development contexts.

By combining planning, economics and property theory perspectives, this paper identifies research gaps relating to the contemporary commons, providing an agenda prioritising property rights for future research funding.

## Introduction

Long-term city sustainability is grounded on an appreciation of the contemporary urban commons. Unfortunately, Garrett Hardin's (1968) phrase "tragedy of the commons" has now been accepted so widely that most modestly educated property economists jump to the conclusion that defence of the commons is retrograde thinking that could only take you back to the popular caricature of the ancient commons of the medieval ages. In response, we argue that the city is a material manifestation of the social nature of humanity comprising a variety of competing and complementary property rights - ranging from the individual to the communal. As a social space, the city embodies physical elements necessary for social interaction. These are the contemporary commons. In introducing the notion of the contemporary commons, we have the opportunity to shed new light on the interaction of common and private property and in the context of social necessity. In particular, this line of investigation has the capacity to demonstrate the social necessity of the commons, its place in making the city truly human and its contribution to the welfare question that lies at the heart of the problem of economics

The heterogeneous nature of the commons, both in composition and extent in different urban contexts, as a central issue in competition for property rights requires a systematic investigation. We offer a preliminary analysis of the contested state of contemporary urban commons in an Australian city, through a case study of the Darling Harbour scheme in Sydney. Moral claims of 'ownership' often outweigh legal claims of ownership over the scarce public spaces that comprise the contemporary urban commons. We question if these contemporary commons provide a counter-weight to the privatised rigidities of urban capitalist societies.

## Property Rights

Whilst property rights provide a coherent legal, economic, and social framework for the relationship between people, place and property, they are often misunderstood and misinterpreted by the multiplicity of stakeholders sharing the space that is the contemporary metropolis. The competing demands and expectations on space, exacerbated by the needs of urban consolidation in the evolving cityscape, add to the confusion.

There are few concepts in economics that are more central, or more confused, than those of property, rights and in particular property rights (Bromley, 1991). Recent property rights discourse is dominated by the Chicago School (Gordon, 1954, Alchian, 1965, Demsetz, 1967, Cheung, 1969, Umbeck, 1977) position and that of new institutionalists (such as Coase, 1960), that focus on property rights in the firm, rather than specifically in real estate. More recently, Alchian suggested the purported conflict

between property rights and human rights is a "mirage", as property rights are human rights (Alchian, 2006). This concurs with Pejovich's view that property rights are not physical things, but rather relationships between individuals surrounding scarce goods and their use (Pejovich, 1990). The emphasis on economics is balanced by the legal view that property rights are "the creation of positive law whatever social or political theory may presuppose about their metaphysical origins in the natural or supernatural order of things" (Denman, 1978, p.3). At the foundation of these positions is a fundamental commitment to private property as intimately connected with the liberty of the individual as argued early in the twentieth century by Richard M. Weaver (1948) who claimed that private property was the "*last metaphysical right*" of humanity and one that was under attack by opponents to clear thinking. Grounding the question of property in metaphysics is a proposition that sits awkwardly with the modern mind, organised as it is to follow David Hume's rejection of metaphysics.

The perceived loss of private property rights to the State, or a third party, is a theme that also raises populist concern in some quarters of the US and Australia against what Wolfgang Kasper calls the *Neo-Socialist Onslaught* (Kasper, 2004). It is also a cause that has received global support by the International Real Estate Federation (FIABCI) since it was first championed at their 2000 Congress by Gustav Saedberg (as cited in FIABCI, 2000a, FIABCI, 2000b, FIABCI, 2001a, FIABCI, 2001b, FIABCI, 2001c, and FIABCI, 2002). Saedberg, as with de Soto, Kasper, Eagle and many others, focussed on the bedrock of western society, the notion of a strong system of private property rights as the foundation of capital (de Soto, 2000, Eagle, 2005, Kasper, 2004, Kasper, 1998). The argument follows that without capital, economic growth slows. Implicit within this view is that ever-increasing economic growth will lead to contentment, happiness and possibly even a sustainable future.

The libertarian view regards ownership as the highest level of right to act, and that property rights vest only with the individual. In contrast, Lyons *et al.* (2007) view is that with property rights at any level come roles, obligations and restrictions. This perspective is especially crucial in considering challenges concerning the maintenance and development of the urban commons, which is potentially threatened by conflicts over roles and obligations of the various stakeholders who see themselves as having certain property rights over the commons. At one level this can be seen as an issue of information and negotiation transaction costs (Webster and Lai, 2003, Coase, 1960). But at a deeper level such conflicts need to be understood in terms of a more nuanced view of the nature of property rights (Cole and Grossman, 2002), of varying ideological beliefs about the urban commons, and of implicit power relationships between stakeholders (Flyvbjerg, 1998).

The end point of this entire line of thought is private property, usually adopted as a necessary foundation to US style market economics. It leaves the commons as a lost opportunity, one that will be abused if not privatised. It rests upon the assumption that economics is about the mechanics of persons who have property. Garrett Hardin's rejection of the commons is intelligible in this context, especially when one understands that the purpose of Hardin's paper was not an analysis of the commons as an institution, but a defence of US population policy, into which a rejection of the commons formed a very small part. What Hardin characterised as 'commons' were, in fact, open access resources. It is important to acknowledge that Hardin was looking at grazing commons in contrast to the many and varied (and often inappropriate) *contemporary commons* of the time to which the tragedy analogy has, often tragically in an intellectual sense, been applied over the years. Hardin's wider point was that commons in any form are dysfunctional and unsustainable, suggesting that all commons should be privatised and priced. Embedded in Hardin's argument are assumptions about people, their nature, their property, and their behaviour.

A separate set of conclusions led Pierre Joseph Proudhon (1994) to declare that "*property is theft*", giving early impetus to the socialist movement and a critical view of property. A key issue in the trajectory of that movement was that it was not concerned with commons, so much as with state ownership of property, a system that shares as much with personal private property, as it does with social failure. What both Proudhon and Hardin neglected to recognise was that their objections to both private and public property rested on more basic cultural assumptions about human nature. Historically, the commons were one component of a complex of institutions that were supported by a particular cultural outlook that had at its heart a commitment to solidarity, not individualism. Today, that type of outlook tends to be found only amongst indigenous people who have retained their cultural traditions. It is no coincidence that these people are very comfortable with their land as predominantly commons and it supports a very leisured society (Robinson, 1987).

Against Hardin's claim that commons carried the seeds of their own destruction, the historical facts tell a very different story. In the era through which the commons flourished, especially 800AD to 1500AD, so too did productivity and incomes. George Grantham (1995) found that net agricultural productivity from 800 to 1300 increased over 800%. This was supported by Joyce Burnette and Joel Makyr's (1995) conclusion that wage increases in the order of five to eight times occurred in the period

between 1100 to 1300. In England, the Enclosure movement which was the death knell of the commons, began in earnest through the sixteenth century. Thorold Rogers (1884) found that through that century working person's wages fell by something in excess of sixty percent. Historically, the commons are associated with economic growth and the flourishing of the common person; it becomes a worthwhile exercise to test whether this is not still the case.

Early modern property theory was pitched against this reality. When John Locke (1690) articulated his theory of private property, it was an attempt to defend it in the face of rising disenfranchisement and the growing impoverishment of English working people. Despite the limitations of his theory, it remains as one of the foundations of modern property theory. The following century saw William Blackstone (Blackstone, 1769) and Adam Smith (Smith, 1999) agree that property was simply a positive institution of possession supported by state sanction. It has no moral or natural basis in modern thought according to these, though if Blackstone's description of it as a "*despotic dominion*" has more than poetic intent, the liberties it affords its owner are at least a little suspect. If this is so, then perhaps the real tragedy of the commons is not their overuse, as Hardin surmised, but their demise.

To make sense of this question, one should return to the fundamentals of human nature. Humans are social mortals. As mortals, they require space to exist and flourish. As social beings they interact to flourish. At no point is there a natural link between the human person and the external world, at least those aspects of the external world that the individual has not personally produced. This means that external property is naturally common. Aristotle (1981, d.322BC) was the first to systematically recognise this, however he went further and noted that it was practical for more effective management for it to be owned privately, even though its use should remain in some sense common. This formulation provides the key to understanding the commons, both historically and in the contemporary city. The space in the world is naturally common to all and desirable as a necessity of life. To deny common access can only be justified on the basis that it is required for superior effectiveness, which is the nub of Hardin's tragedy argument and the backdrop to modern economic theory. Even where owned, Aristotle concluded that property must maintain a common element. This will be part of the target in investigating commons in Darling Harbour.

As social creatures, humans need a forum for interaction, and the higher the degree of common access to that forum, the greater the possibility for social realisation. It is no surprise that every private parcel of land in Australia is connected to a part of the commons, a public road. This simple yet deeply meaningful fact is the one barrier to the commoditisation of our social potential. Were it the case that we would have to pass through a private property to move from our living space (home or work) to a social forum, then the possible toll for the carriageway would price the social element of our nature. The potential for exploitation and dehumanisation of those with limited means is obvious. Conversely, the proximity of commons, contributes in no small measure to the value of private property. Where private property is located adjacent to highly socialised common spaces, such as the central commons of a major city, that private property appropriates substantial value as an externality from the surroundings.

An understanding of the roles, obligations, and restrictions of the different stakeholders in the urban commons yields baseline information that allows an exploration of these deeper perspectives and challenges to the commons in achieving urban sustainability.

### **Knowledge Gaps**

By combining planning, economics and property theory perspectives, it is possible to address knowledge gaps by informing and complementing the larger body of work currently underway primarily by science and health scholars internationally into the relationship between urbanism, environment, and health. However, this body of work has tended to assume an unproblematic view of the commons as it relates to urban sustainability, and has not explored how contested and overlapping property rights to the commons might influence the use of the commons to achieve sustainability.

There has been significant analysis of the goals of, and impacts on, the range of stakeholders involved in urban planning schemes that involve consideration of the commons, especially using Lichfield's (1996) planning balance sheet / community impact evaluation methodology. However, the treatment of the commons in such analyses has considered it as a product of the goals of different stakeholders rather than as being a contested site for different property rights, and where the way in which those rights are resolved in each area of the commons has central implications for urban sustainability.

## Darling Harbour

Sydney's Darling Harbour provides a lens through which to explore the mixed-use contemporary commons. Darling Harbour, on the western boundary of the Sydney CBD, has been a port area since the early days of the city. The construction of a new port to the south at Botany Bay in the late 1970s, to relieve congestion in port activities in Sydney Harbour generally, caused an extensive area (3.5ha) of land at the southern end of Darling Harbour to become available for redevelopment. By 1983, a government study had identified preferred development, including an educational-entertainment park, Chinese garden, major residential complex, foreshore retailing, and a maritime museum (Young, 1988, p.193). In 1984, the NSW Premier announced the government's intention to develop Darling Harbour as the state's major contribution to the Australian bicentennial program for 1988. The aspiration was for the Darling Harbour development to capture more of the already expanding global tourism numbers coming to Sydney. The project envisaged a major exhibition and convention complex, a harbour side market and a hotel along the foreshore, as well as the Chinese garden and maritime museum. A casino was included in the plans, with the state licence fee intended to recoup much of the overall development costs of the project.

With a deadline of only three and a half years to demolish and rebuild over 50 hectares of inner city land, a strongly pro-development institutional framework was established. In September 1984, the Darling Harbour Authority (DHA) was established by an Act of state parliament. The Authority's board contained appointees of the government, including several from the business sector. It became as a public (state) quasi-autonomous semi-government authority in which the public had very limited influence, via ministerial oversight. The large land holdings held by the state government at Darling Harbour vested in the Authority. Proceeds from redevelopment of this land were to be repaid to the State Treasury to help defray government development costs. The Authority had sweeping powers, with authority to make its own planning controls outside the existing state planning act (the Environmental Planning and Assessment Act) and outside the Heritage Act. It proceeded to produce its own development strategy by the end of 1984. The design and development responsibilities of the Authority were given to private companies, which reported to the Authority's executive. A Quality Review Committee was appointed to monitor the quality of the fast track process (Young, 1988, p.195). Most of the facilities in the strategy were completed by 1988, with the principal exception of the casino, which did not open until the mid 1990s.

The result of Darling Harbour's redevelopment under the DHA has been the formation of a space with a complex and uneven landscape of property rights, in which public 'rights' vary from site to site depending on the particular institutionally-driven micro-history of each hereditament. Up to the 1980s, when Darling Harbour was Sydney's main port area, the foreshore was predominantly owned and administered by two state government authorities: the Maritime Services Board (port operations land) and the State Rail Authority (goods railway land). Public rights over these areas were essentially limited to access rights associated with carrying out port or rail business. A small proportion of the land around Darling Harbour was in private ownership, mostly warehouses and storage facilities associated with port activities, but also included incidental commercial premises such as hotels. The state government also owned Pyrmont power station, a stand-by facility that was being phased out with the construction of major power stations on the coalfields north and west of Sydney. Again, public access rights to these properties were generally limited to persons employed or doing business there. Thus while most of Darling Harbour land was in public ownership, the general public had few rights to enjoy the use of the space. There were no 'commons'.

### The Mosaic of Property Rights

The formation of the Darling Harbour Foreshore Authority and subsequent redevelopment created a mosaic of new public rights. This mosaic essentially comprises a spectrum of property rights, resulting in a variety of contemporary 'commons' that range from spaces with unrestricted public access to private leasehold property with limited public access rights. In detail, we can identify several distinct types of commons at Darling Harbour:

- (1) The **first** type of commons is the classic version of a space that is publicly owned and open for general public use. This type is found in the open space of Tumbalong Park and the promenades around the harbour. Whilst accepted as commons, it is monitored by a range of security cameras and patrolled by park 'rangers'.
- (2) The **second** type of commons are a shared space on land alongside the promenades, where café's and restaurants 'spill' over onto the commons to provide popularised 'al fresco' dining. This is achieved through a clear demarcation of space for which the café's and restaurants pay a significant licence fee.

- (3) A **third** type of commons is a public garden with an entry fee – the Chinese Gardens. In this case, the public right to use the commons requires a payment, but the space is indirectly controlled by the public via the Authority.
- (4) A **fourth** type is an extension of the second type. It involves areas set aside for public spectacle that require an entry payment, but which are privately leased and operated. Darling Harbour has several such 'commons', including the aquarium, maritime museum, and Australiana zoo. We can view such areas as a type of commons in that their predecessors in central cities and elsewhere were usually provided by the government or non-profit organizations with free entry. The Darling Harbour versions retain a tenuous link with older public equivalents by dint of their long-term leases of land owned by a public authority.
- (5) A **fifth** type of commons are the public spaces in private facilities on land leased from the Authority, such as in the Casino in particular. These are a genuine commons insofar as they are on publicly owned land that allows, to all outward appearances, free and unrestricted access. However, these spaces are in fact leased by the Casino company and are patrolled by security guards who do not have the right to exclude entry to anyone. They thus represent a version of the privatised commons.

In addition to the above, but continuing the same logic, two additional types of commons can be identified as follows:

- (6) A **sixth** type of commons are the public spaces in private facilities on land leased from the Authority, and for which an entry fee is charged. These include the exhibition spaces and conference facilities that are hired for use and for which individuals typically pay for entry. These are a commons insofar as they physically offer the same level of common access as the third and fourth types, but are managed by private business, rather than public entities. They provide a social space at a fee. To the extent that they provide a social space they are a type of commons, however the measure of their commonality is inversely related to the level of the charge for access. They thus represent a version of the privatised commons.
- (7) A **seventh** type of commons are employment spaces in private or public facilities on land leased from the Authority, to which only limited entry is possible. These are perhaps the most limited commons, in that access to them is limited to certain persons, however the persons admitted are not the lessees, but persons who derive their livelihood from using them as employees. For these people, such spaces provide the physical context for the social action which is employment and they rely upon its free provision. They represent a valid, though hitherto undefined form of the privatised commons.

The dimensions of these various types of commons are shown in Figure 1. This sets out a matrix of commons, some of which are managed privately, some publicly and for access to which fees may or may not be charged. We interpret each of these in more detail in the next section.

Figure 1: Matrix of the mosaic of property rights (source: authors)

|                  |  | Public Land      |                   |
|------------------|--|------------------|-------------------|
|                  |  | Managed Publicly | Managed Privately |
| Fee for Entry    |  | (3)              | (4)               |
|                  |  |                  | (6)               |
| No Fee for Entry |  | (1)              | (2)               |
|                  |  | (7)              | (7)               |
|                  |  |                  | (5)               |

The rationale underlying the formation of this range of commons is evidence of the Authority's assessment of the mix of property rights needed to maximise development in a way that ensures appropriate investment return to the state government. In particular, the provision of traditional commons in Tumbalong Park, and elsewhere, makes Darling Harbour an attractive place for visitors.

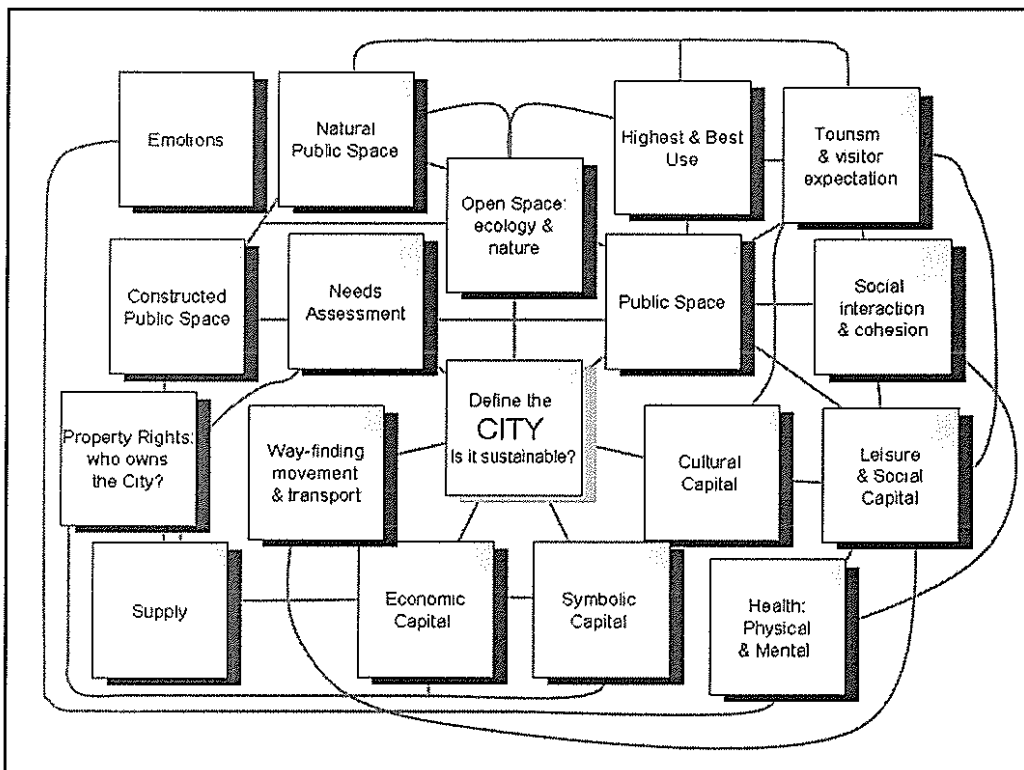
In turn, this will increase the custom for profit-making activities at Darling Harbour. Thus, we argue that Darling Harbour illustrates a new role for urban commons in an era of constrained government capital expenditure, with governance replacing government in the public sphere to meet shortfalls in public provision. In the contemporary era of governance, the creation of a variety of urban commons can leverage private investment in addition to meeting traditional community needs for public spaces.

In this process, the creation of a relatively autonomous agency like the Darling Harbour Authority complete with its own planning and development powers, greatly facilitates these outcomes. In this sense, the Authority has effectively created a private city precinct in which public access and related property rights are given in ways that maximise the Authority's interests (c.f. Glasze *et. al.*, 2006). The Authority is vested with the powers normally held by local government to choose the bundle of developments, including various types of commons that benefits its goals. The transaction costs involved (basically, the operating costs of the Authority) have been kept in check by the granting of strong powers that require minimal negotiation with the rest of the public sector, and by contracting out initial design and development activities. Normal democratic processes for debating the supply of commons have been able to be excluded because of the Authority's powers to by-pass the public consultation processes of the NSW Environmental Planning and Assessment Act, and because of the original economic development and project deadline dimensions of the Authority's planning and development activities.

### Interpreting the Commons

The various types of commons found in Darling Harbour reflect a hierarchy of social accessibility. Commons of first type (1) are true commons, dedicated to the public for free personal and social use, subject to limitations of acceptable use. They provide the physical context for social action and connection.

Figure 2: Interacting components define the City as Common Property (source: authors)



The second type (2) provides nominally free social access, but carry a social more for persons using the space to participate in a commercial relationship with the proprietors of the restaurants in order to validate occupation. Their value to the restaurant proprietor comes largely from their connection to the type one (1) commons and the entire surrounding environment in its physical and social dimensions.

The rent paid by the restaurant proprietor is based on the business that flows from this connection and the desirability it creates for the humans who use the area.

The third (3) and fourth (4) types of commons are private property owned by the state. They behave similarly to the fifth (5) type, except that they have an element of social identification as public space which connotes a relationship between the owner and user that make the extraction of a profit repugnant. The consequent poor commercial performance of commons of this type deserves close study as an example of a variety of commons, such as public car parks and camping grounds that have, in recent times, been privatised to improve their commercial performance.

The fifth (5) type illustrates the social dimension of private property. While this land is leased from a public authority, its treatment is private and its management is directed towards commercial profit. It functions as a social space, because commerce in any form is a social activity and the provision of services, such as gambling opportunities, is social.

The final two types of commons (6 & 7) have conceptual links to the foregoing. They rely on their character as providing a space for social activity and derive their value from the matrix of surrounding commons. The seventh form (7) of commons recognises that work, as well as leisure, is social, and even when nominally private, employment space is a commons.

### Research Directions

The intention of highlighting property rights issues over the contemporary urban commons is to identify a knowledge gap in land economy and place property rights over the commons on the research agenda. To this end, the authors have secured preliminary research funding from the Education Trust of the Royal Institution of Chartered Surveyors to provide an enhanced understanding of the interaction of people, place and property rights in the common areas of the contemporary metropolis (see Figure 2).

Table 1: Property Rights Summarised (adapted from Boydell, 2007) evolved from: (Crocombe, 1975, Payne, 1997, Rigsby, 1998, Sheehan and Small, 2002, World Bank, 2003, Power, 2003, Farran and Paterson, 2004)

| Right                                      | Explanation  |
|--|--|
| Direct use                                 | Rights to plant, harvest, build, access and similar, may be shared rights                            |
| Indirect economic gain                     | Such as rights to tribute or rental income   |
| Control                                    | Conditions of direct/indirect use, held by persons other than the user                               |
| Transfer                                   | Effective power to transmit rights-by will, sale, mortgage, gift, or other conveyance                |
| Residual rights                            | Remaining rights at the end of a term (such as lease, death, eviction), includes reversionary rights |
| Rights of identification (symbolic rights) | Associated with psychological or social aspects with no direct economic or material function         |
| Duration                                   | Length of time property right is held, indicating profits and/or savings                             |
| Flexibility                                | Right should cater for modifications and alterations   |
| Exclusivity                                | Inverse of the number of people with shared or similar rights, more relevant to water property       |
| Quality of title                           | Level of security that is available as tenure shifts from the perceived optimum of notional freehold |
| Divisibility                               | Property right can be shared over territories, according to season, etc.                             |
| Access                                     | Entry/ admission onto the land   |
| Withdrawal (extraction)                    | Extraction of resources by owner despite leasing property  |
| Management                                 | Be able to make decisions on how and by whom a thing shall be used                                   |
| Exclusion                                  | Disallowing others from entry and use of resources   |
| Alienation                                 | Transfer of an interest (right) in property to another, in perpetuity                                |

The potential beneficiaries are the multiple stakeholders who use the contemporary urban commons for a range of business and recreational activities. We are in the early stages (June 2007) of a twelve month analysis to deconstruct the contemporary commons through a comprehensive stakeholder analysis of the multiple property rights (see Table 1) in a modern mixed-use recreation / leisure space in the heart of a modern city.

Recognising that the statutory authority (Darling Harbour Foreshore Authority) has levels of institutional control over private property, governance, communal management and market, the results will be applied to provide informed balance to the libertarian / communal debate over shared access of urban space to support city sustainability.

## Conclusion

Property has relevance because it facilitates human life and a key part of human life is its social dimension. The commons represent spaces for life that generally remain open access. They interact with the commercial value of privatised space though contributing in a meaningful way with that space, giving it value. Even when space carries a fee for access, such as public gardens or private exhibition spaces, they retain key components of their social and common character, though the net utility of this value is diminished by the access fee. Even employment space can be thought of as a form of commons, as employment is a vital component of contemporary urban life and is fundamentally social.

Viewed in this manner property can be seen to be predominantly a matrix of commons, where the private fee for access, usually associated with private property, becomes secondary to its character. Indeed, the value of the potential fees for access can be understood in terms of the success of property as commons, and the quality of surrounding commons.

This research explores frameworks for identifying appropriate divisions between individual property rights and those of communities and society in general. It also discusses the appropriateness of controls, markets, voluntary agreement, and other mechanisms for allocating property rights in complex urban development contexts.

The contribution that this paper makes provides an invitation to, and terminology for, more sophisticated discussions of public spaces, our contemporary commons, in urban areas. As we assert at the outset, cities cannot achieve sustainability without commons. This research will inform and educate the widespread lack of understanding of, and misunderstanding over, the diversity of property rights affecting common areas of a city and the multiplicity of stakeholders who hold those competing rights.

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