

***University of New South Wales Law Research Series***

**FERTILE OCTOGENARIANS IN CYBERSPACE:  
WHY AND HOW TO USE TECHNOLOGY TO  
CONNECT THE LAW SCHOOL CLASSROOM  
TO LEGAL PRACTICE**

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*Fertile Octogenarians in Cyberspace: Why and how to use technology to connect the law school classroom to legal practice*

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This paper is divided into two halves. The first half makes some general comments about the nature of law teaching in modern universities in Australia, in particular the disconnect between law in the academy and law in practice. The second half explores specific ways to improve traditional teaching by using technology to better connect the classroom to practice.

*The problem with law schools*

This first section is prefaced with a caveat (if readers will excuse the land law pun). It is hard for any law teacher to know exactly how and what other law teachers are teaching in multiple institutions and multiple courses across the country. My experience of teaching primarily relates to land law and some equity, and my knowledge of courses outside my own institution is limited to conversations with colleagues, as well as to familiarity with the content of widely-used text and case books. So, my caveat is this: most of what I am arguing relates to traditional property courses and may or may not have application to other courses. I suspect it does to some, but may not to all. There may be courses that have made the changes I am arguing for years ago (including land law courses), and consequently some of the criticism of case book and Socratic teaching might seem old hat.

With that caveat about specifics and generalisations out of the way, one generalisation about United States law schools made by the influential Carnegie Report in 2007 rings very true to me in relation to Australian law schools. The Report concluded that there was too much emphasis on doctrine in law schools and too little emphasis on preparation for practice.<sup>1</sup> The Report argued that teaching methods were ‘conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients’.<sup>2</sup> My perception of Australian legal education is that we also have a greater emphasis on doctrine than preparation for practice. Too much content is what I would describe as ‘conversations with colleagues’. That is, the material is suitable for a conversation with a fellow colleague with years of experience, but inappropriate for a discussion with students who, three weeks earlier, knew nothing about the subject.

There are a number of reasons that excessive emphasis on doctrine and academic material is problematic.

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<sup>1</sup> Carnegie Foundation, *Educating Lawyers: Preparation for the Profession of Law*, 2007 (‘Carnegie Report’)

<sup>2</sup> Carnegie Report, p6.

First, while law schools do not *only* train lawyers, *at the very least* we should be training lawyers. Putting aside the pressures of government funding that I will address at the end, I think that if the Australian taxpayer were asked why they pay tax to fund law schools, the answer would be to train lawyers. Without properly trained lawyers, the community cannot benefit from its own legal system. When I teach, I take my obligation to produce good lawyers very seriously and it determines how and what I teach.

Second, most of our students come to law school to learn to be lawyers. While some will never practise, many (and in the case of our law school, it seems most) will. In a recent survey of our students conducted for research on the introduction of a closed book exam, we asked students if they intended to practise law.<sup>3</sup> Only 14 % said that they were sure they did not want to practise; 29% were unsure and 57% were certain that they did. Further, I question the accepted wisdom of encouraging students to do law as a 'good general degree'. An arts degree or science degree is a general degree, law is not, any more than architecture is a general degree. For example, while it is inevitable that we teach some English and Australian history in land law, students will not gain either a broad or deep understanding of history from my subject, because the bulk of the content is law. If we tell students that law is a general degree and attempt to teach accordingly, we will simply fall between two stools, failing to give students a thorough understanding of any discipline.

Third, when we provide students with too much doctrine and academic material – what I have termed 'conversations with colleagues' - we do not simply risk students not understanding the complexity, we risk them not understanding anything at all.<sup>4</sup> That is, by swamping them with detail, students fail to learn the basics. As evidence of this, I would ask people to consider the word 'indefeasibility'. I am guessing that many people are now feeling mildly ill. Heaven forbid you might be asked to define it. Indefeasibility is the most central, basic concept in Australian land law but many students leave property with a tenuous grasp of it. I have always suspected that this is because we try to teach too much, at the expense of foundational understanding.

Finally, if we do not connect doctrine, and more importantly statute, to practice, it is extremely unlikely that our students will ever engage in 'deep learning' or 'critical thinking', the buzzwords in the modern academy. If a student does not understand that the doctrine of 'touch and concern the land' will determine whether their client, who has just bought a shopping centre, can sue the tenants, they have not understood the doctrine of touch and concern the land. If they have not been shown that the mundane, ordinary way to form a binding land contract is for both parties to sign identical copies and swap, they will never understand *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387, no matter what they can say about promissory and equitable estoppel, swords and shields. Law

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<sup>3</sup> C Sherry, L Terrill and J Laurens, '(Re)Introducing closed book exams in law school', *Legal Education Review* (forthcoming).

<sup>4</sup> C Sherry "Teaching Land Law: An Essay" (2016) 25 *Australian Property Law Journal* 129.

does not exist in a vacuum for the purpose of academic analysis; it exists to regulate people's businesses, land dealings, and private relationships. If students are not shown *how* law is doing that, they will not genuinely understand the law. Their understanding will be superficial and limited to parroting legal or academic jargon. It is not possible to think 'critically' about any matter that you only understand superficially and so we will fail to achieve our academic aims of either 'deep learning' or 'critical thinking'.

### *The problem with case book and Socratic teaching*

Having enthusiastically taught Socratically, with a case book, for decades, I have recently begun to feel uneasy about both.

The primary sources of modern law, at least in private law, are

1. statute;
2. documents drafted by the parties (contracts, registered land dealings, trust deeds etc); and
3. case law.

If we teach primarily through cases, we are primarily teaching only one third of the law and arguably the least important third.

The difficulty of moving away from case book teaching is that cases are neat little chunks to deal with in class, and being stories about people's lives, they are more interesting than statutes. Plodding through the endless provisions of a modern statute is a dull prospect for both teacher and students (particularly in my area of expertise, strata title<sup>5</sup>), and so devoting a proportion of class time to statutes that *accurately* reflects their role in modern law is challenging. However, it is a challenge that we might be prepared to meet if we consider the following proposition.

While Socratic teaching is generally preferable to traditional lectures, if we are honest about what we are doing in Socratic classes we may admit that it is largely information delivery.<sup>6</sup> Typically, the students will have been set readings, usually cases, and they will come to class being expected to discuss them 'critically'. What then happens, at least in my classes, is that I say, "So, can someone tell me the facts of the case?"; "Great, thank you. Now can someone explain the judgment?" The students oblige and I correct them when their understanding is askew. Sometimes this is a very useful process, particularly when they have read cases like *Hill v Tupper* (1863) 2 H&C 121; 159 ER 51; [1861-73] All ER Rep 696 which is about whether the right to put 'pleasure boats' on a canal can be granted as an easement, and Pollock CB has helpfully said, 'The answer is, that the law will not allow it'. Discussing

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<sup>5</sup> C Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties*, Routledge, London, 2017.

<sup>6</sup> P Wangerin, 'Technology in the Service of Tradition: Electronic Lectures and Live-Class Teaching', (2003) 53 *Journal of Legal Education* 213, 215.

the case in class allows me to elucidate, explaining that if Lot 1 has the permanent, exclusive right to run a boating business on Lot 2, and Lot 1 is sold, as it inevitably eventually will be, and the new owner of Lot 1 grows potatoes or runs a school on Lot 1, then the use of Lot 2, the canal, will be permanently and pointlessly stymied. No one else can run a boating business on the canal and the person who has the right to do so, Lot 1, does not want to. Such matters are better left to contract law, enforceable between individual parties, not land law where they will be enforceable against an unlimited number of owners through time.

But, cases like *Hill v Tupper* are the exception, rather than the rule. Most of the cases our students read are more recent and as students are all literate and bright, having read them at home,<sup>7</sup> they will have understood much of what the judges were saying. Going through the cases in class is simply repetition and provides a disincentive to read.

What the students have not understood and what the Socratic method does not teach is how to *apply* the cases. Lawyers are not employed 'to discuss' cases, critically or otherwise. They are employed to apply cases, and most importantly statutes, to their clients' lives and businesses. In private law, applying the law also means being able to draft documents, (contracts, leases, mortgages, deeds etc) that will avoid problems for clients and secure benefits, and which are enforceable because they comply with case law and statute.

### *Experiential learning through simulations*

In response to the Carnegie and other reports,<sup>8</sup> which criticised the lack of focus on the application of law in doctrinal courses, United States law schools increased their focus on clinical legal education. The 2008 financial crash and dramatic drop in law school enrolments provided further incentive to ensure that students were 'practice ready'.<sup>9</sup> Most United States law schools now have multiple clinical programs and in 2014 the American Bar Association, which accredits law schools, made some clinical experience mandatory.<sup>10</sup>

However, invaluable as they are, clinical programs do not necessarily solve the problem of excessive focus on doctrine. As Thomson notes, clinical and doctrinal courses have operated side by side with little interaction.<sup>11</sup> Students are still being subjected to exclusively doctrinal courses which make no reference to practice. Property is often cited as a prime

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<sup>7</sup> I realise that the assumption that students have done their reading at home is a luxury that many law teachers do not enjoy. Our law school teaches in seminars, typically of around 40 students. We have compulsory attendance and compulsory participation marks, which ensure that the majority of students read before class.

<sup>8</sup> American Bar Association, *The Legal Education and Professional Development: An educational continuum*, 1992, (the 'MacCrate Report'), Roy Stuckey and others, *Best Practices in Legal Education: A vision and a road map*, Clinical Legal Education Association, 2007, and the Carnegie Report (2007), are all discussed in D Thomson, 'Defining Experiential Legal Education', 1(1) *Journal of Experiential Learning* 1.

<sup>9</sup> *Ibid*, 2.

<sup>10</sup> *Ibid*, 5.

<sup>11</sup> *Ibid*, 3.

doctrinal course. Without a Torrens system, property law in the United States is surprisingly more strongly connected to its English roots than Australian property law,<sup>12</sup> and as a first-year course, it is typically heavily doctrinal, (with some notable exceptions<sup>13</sup>). Thomson notes that the obvious problem with clinical and doctrinal programs operating side by side as a duality is that practice and doctrine do not operate as a duality in the real world; they are inextricably linked. If we are only teaching our students the doctrine and not how it is applied in practice we are only teaching them half of the necessary material.

As well as not affecting the nature of doctrinal courses, clinics are expensive to run, for law schools and clinics themselves if they are independent organisations. As Svetlana German and Robert Pelletier highlighted in their paper '*An innovative future for legal education: problem based learning, clinical placements and the transformation of the doctrine/skills dichotomy*', students get the most value from clinics when they are closely supervised by solicitors but this comes at a time and monetary cost for the legal practice. Time spent with students is time not spent with clients.

Further, with ever-growing cohorts it is impossible to teach entire compulsory courses through clinics and so we need to find a way to get quasi-clinical or experiential learning into the classroom. Simulation is one of the best ways to do this: rather than giving students real lawyering tasks with real clients, we can simulate lawyering and other practical tasks in the classroom and in assessment.

Of course, law schools have always taught through some simulation. The traditional problem question, used in exams and assignments, simulates the work barristers do when they are presented with a mess of facts to which they must apply the law. However, that is often the limit of simulation, and when problem questions are written with 'silly' facts and characters, they do a poor job of simulating the experience of being a lawyer.<sup>14</sup>

Simulation can go much further than this, from single exercise simulations, like drafting a contract or a set of strata by-laws, through to entire courses based on extended and changing fact scenarios.<sup>15</sup> I have been exploring how we could teach the entire land law curriculum through a simulated redevelopment of a peri-urban site. The developer would buy the land and sell houses (contract of sale and Torrens transfer); plans of subdivision would need to be registered (deposited plans and strata plans); easements would be

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<sup>12</sup> For example, see Casner, A James, W Barton Leach, Susan F French, Gerald Korngold and Lea VanderVelde, *Cases and Text on Property* (Aspen Publishers, 5<sup>th</sup> ed, 2004).

<sup>13</sup> Heather K Way, Lucille Wood and Tanya Marsh, *Real Property for the Real World: Building skills through case study*, Foundation Press, 2017. The 'case study' in this book is not study of reported appellate cases but fact scenarios and real documents which invite students to step into the role of the lawyer. It is designed to 'plug-in' to existing first year, doctrinal curricula.

<sup>14</sup> It might seem a minor quibble but the law school tradition of writing 'amusing' fact scenarios creates another barrier to our students understanding that the law they are learning is real, serious and regulating the lives of people.

<sup>15</sup> J Feinman, 'Simulations: An Introduction', (1995) 45 *Journal of Legal Education* 469, 470.

needed for services and restrictive covenants for the houses; mixed-use development is now the norm and the commercial space would need leases; finally, someone could go bankrupt necessitating a mortgagee sale. As there are a number of online city-building games (eg Sim City; Cities: Skylines), I have been exploring the possibility of creating an online simulation of a peri-urban redevelopment, (with limited success so far). This brings me to the radical game-changer for using simulation in teaching law: technology.

### *Technology: The law school teaching revolution*

I am an enthusiastic developer of teaching technology. Our University uses Moodle, a free, open-source software learning management system, and my sites won a *Legal Innovation Award* in 2015. I have also been the recipient of University and Faculty grants to develop my sites. I say this not to boast, but as a preface to this statement: I don't know how the internet works. In all seriousness, I have no idea how the internet reaches my house and being married to an IT professional and the mother of young adults, I don't need to know. Someone else will always fix the problems. However, none of that stops me being able to use technology for teaching, because just as none of us needs to know how a word processor works to write on one or how a TV works to watch one, we do not need to know anything about technology to use it in teaching. I think a lot of academics (particularly older academics) are unenthusiastic about teaching technology because they are not interested in technology per se. Neither interest in technology, nor technological competence is necessary to develop teaching technology. You just need imagination and the ability to press a button.

The most significant advantage of technology is that for the first time we can provide large numbers of students with real documents, the second most important source of modern law, at least in private law, and the most glaring omission from case book teaching. For decades, students learned land law without ever reading a lease, an easement, a covenant, seeing a transfer form, a contract or deposited plan. I must stress that was no fault of academics: it is literally impossible to provide 300 students with a hard-copy of a 50-page commercial lease; the copying or publication costs are prohibitive. However, now with technology, a 50-page commercial lease can be given to all students with the touch of a button.

Land law has the peculiar advantage that the real documents drafted by parties are publicly accessible. This is because the Torrens register is public and being online, obtaining the dealings that regulate any parcel of land in Australia is as easy as placing an order and waiting for the tif or pdf file to arrive. Sharing it with students only requires us to hit 'upload' on Moodle.<sup>16</sup> There is no comparison between students reading a real lease and having the covenants in leases described to them or reading a few disembodied covenants

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<sup>16</sup> The use of legal documents for the purposes of teaching comes within the exception of 'fair dealing for the purposes of research or study' in the *Copyright Act 1968* (Cth), s40.

extracted in a case. Reading a real lease, students can see the standard Torrens forms that are essential for any interest in land to be registered. Once you have seen a Torrens form, there is no mystery to them, but if you have not, confusion abounds and unnecessarily so. Reading a real lease, students can see the wide variety of matters that are important to clients when they are going to give their land to someone else for five, ten or fifty years. Reading a real lease, students can see that the cases they have read operate in the real world. For example, when the High Court decided in *Shevill v Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620 that the lessee's actions were not sufficiently serious to constitute repudiation or breach of an essential term, but that it was open to parties to predefine covenants as essential, that was not the end of the matter. The case had a flow-on effect in the commercial lease market because lawyers began to draft leases which defined particular covenants as essential, breach of which entitled the landlord to sue for loss of bargain damages. If we only make students read the case, but do not show them the commercial leases that it affected, we are only teaching them half of the law. There is no point students quoting phrases from cases about loss of bargain damages if they do not realise that those phrases will determine the leases they will draft and enforce for clients in practice.

Real documents can be used for assessment, simulating practice by requiring students to read *and apply* by-laws, leases, covenants, easements etc from beginning to end. Real documents can be used to fill out understanding of cases, the reported versions of which do not include copies of the dealings that courts were applying. However, technology can be used to provide students with more than real legal documents. It can be used for plain language explanations that most of us would hesitate to put in print; it can provide pictures of sites cases were considering; it allows academics to devise exercises, quizzes, and activities for class; to upload media articles that demonstrate the law operating in the real world; and to upload mini-lectures to save class time for activities. The final section of this paper will describe three uses of technology to teach standard sections of land law courses.

#### *Example One: Restrictive covenants*

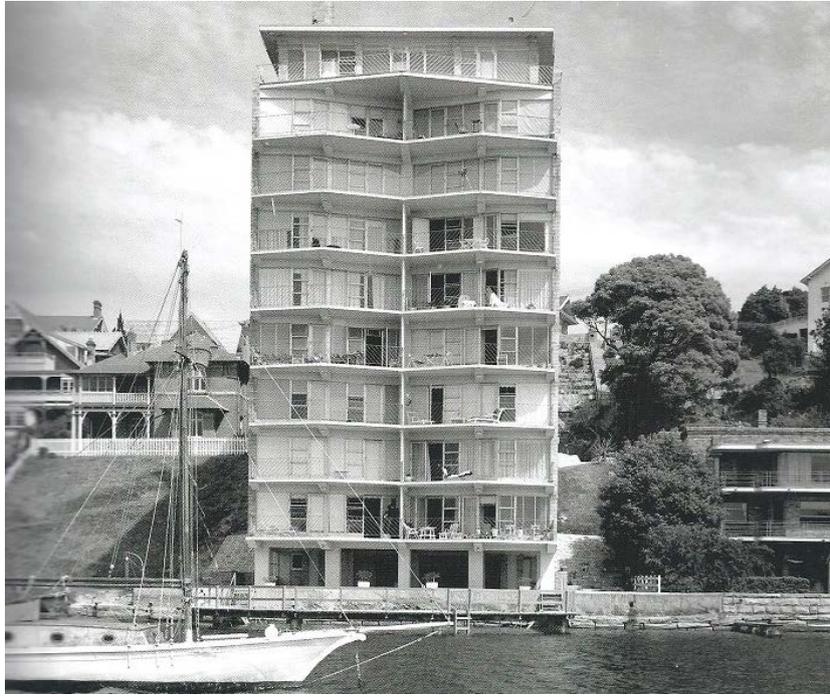
Restrictive covenants are a notoriously difficult area of law. A United States textbook once described freehold covenants as 'an unspeakable quagmire', a 'formidable wilderness' full of 'foul smelling waters and noxious weeds'.<sup>17</sup> However, if taught with the simple aim of getting students to understand how freehold covenants work in practice, rather than a perceived obligation to share countless doctrinal intricacies that have limited relevance in the real world, freehold covenants are both relatively easy and very interesting.

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<sup>17</sup> E Rabin, *Fundamentals of Modern Real Property Law* (Foundation Press, 1974) 489, cited in Susan F French, 'Toward a Modern Law of Servitudes: Reweaving the Ancient Strands' (1981) 55 *Southern California Law Review* 1261, 1261.

The primary use of restrictive covenants in Australia is by residential developers wanting to increase their sale prices. The best way to teach students this is to show them pictures which, with technology, is now possible.

This picture illustrates clearly why a land owner might want a restrictive covenant:

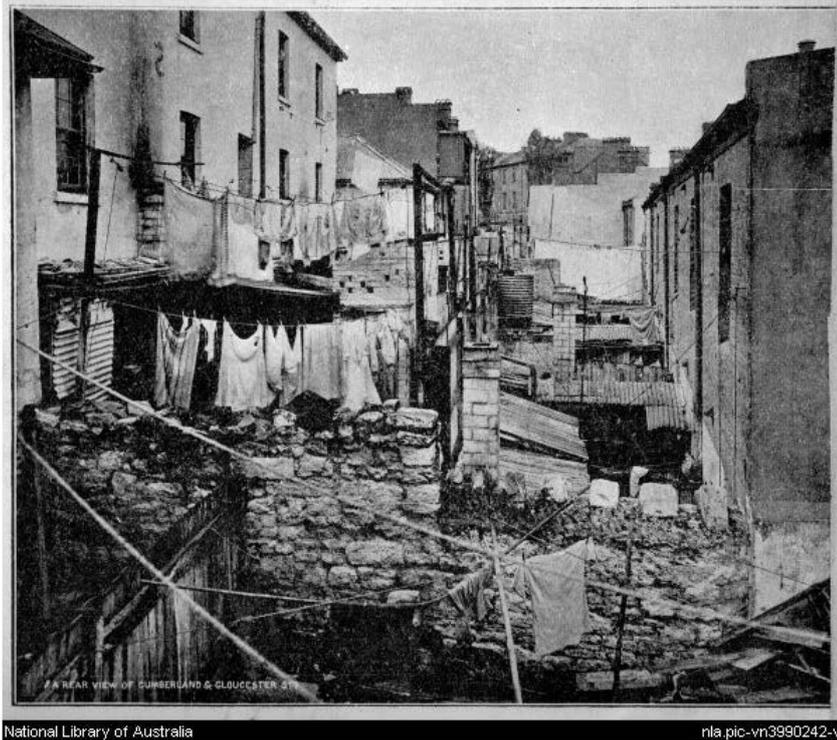


Sydney Harbour<sup>18</sup>

This picture illustrates what private planning through restrictive covenants sought to avoid:

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<sup>18</sup> C Butler-Bowdon and C Pickett, *Homes in the Sky: Apartment living in Australia*, Melbourne University Publishing, 2007, 111.



National Library of Australia

nla.pic-vn3990242-v

Figure 2A rear view of Cumberland and Gloucester Streets, Rocks, Sydney, c1900, National Library of Australia

And this illustrates what restrictive covenant law can achieve:



Haberfield, Sydney; brick and tile, minimum allotment size covenant<sup>19</sup>

<sup>19</sup> [http://commons.wikimedia.org/wiki/File:57\\_Boomerang\\_Street\\_Haberfield\\_02-M.jpg](http://commons.wikimedia.org/wiki/File:57_Boomerang_Street_Haberfield_02-M.jpg)

Students can actively explore a real suburb planned through restrictive covenants, using Google Maps or SIXMaps,<sup>20</sup> and most importantly, they can be given the actual restrictive covenant that regulates that suburb. I use Harrington Park in south west Sydney, and we read the real s88B instrument that regulated the land.<sup>21</sup> We look at the building material restrictions alongside pictures of the houses built pursuant to them (yes, the house has a two-car garage with roller door!); we discuss the social implications of the covenant banning commercial vehicles and trailers, and by asking students to work out how long the covenant operated,<sup>22</sup> we can talk about the double-edged sword, stabilising and stultifying effect of restrictive covenants.

In an effort to get students to engage in 'deep learning' and 'critical thinking', in addition to complex case law I could set them academic readings on the social and political implications of freehold covenants. I could share with them my favourite academic piece on freehold covenant law in which Gregory Alexander argues that:

No single group within a pluralistic communitarian society can be permitted to arrogate to itself unilateral control over the inside-outside problem. There must be some agency that is responsible for maintaining the framework within which a variety of groups can engage in a dynamic process of formulating and reformulating the good ... Courts are an appropriate institution to maintain that framework. Through the dialogic process of adjudication, courts can serve as a bridge between communities and society, preventing the former from lapsing into a solipsistic perspective that would pervert the ideal of community ... the role of the legal system is to connect nomic groups with the rest of society even while recognising their separateness. Disputes over the enforcement of group restrictions present opportunities for a dialogue about the group's shared values and the extent to which they advance the ideal of community or impede it by creating relations of domination.<sup>23</sup>

However, I do not share this with students in a core course, because most will not understand it. Unless they have read a restrictive covenant, seen a housing development to

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<sup>20</sup> SIXMaps is a New South Wales government data base that provides access to cadastral and topographic information, satellite data and aerial photography. It is an invaluable teaching tool for showing students the physical world that land law regulates. For example, nothing illustrates the difficulty of removing restrictive covenants through voluntary buy-out better than showing students an aerial view of an entire suburb planned through restrictive covenants. Students can see the impossibility of buying-out the covenant from hundreds of benefited lots. They then better understand why courts are so equivocal about freehold covenants, and why case law is consequently so complex.

<sup>21</sup>In New South Wales, pursuant to s88B of the *Conveyancing Act 1919*, an instrument setting out easements and covenants can be attached to a plan of subdivision and on registration of the plan, the easements and covenants are also registered.

<sup>22</sup> The Harrington Park covenant was sensibly time-limited to 10 years from the date of registration of the plan of subdivision.

<sup>23</sup> Gregory S Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Community' (1989) 75 *Cornell Law Review* 1, 55–6.

which it applies and had time to digest that, they are not going to understand that the author is simply saying that we cannot let private citizens write whatever they want into freehold covenants because by doing so they can create mini-societies, whose values (embodied in the covenant) may not accord with those of the wider community. We must let judges adjudicate on enduring private land regulation to ensure we do not secede into autonomous groups with deeply conflicting values, (it is no surprise that Alexander is writing about America where restrictive covenants routinely contained racial restrictions<sup>24</sup>). If I want students to engage in deep learning or critical thinking, in a core course,<sup>25</sup> it is much more effective to just show them a real legal document that bans residents parking commercial vehicles and trailers, and ask them to think about what effect that might have on the social diversity of the suburb, and whether diversity or exclusion are values to which we should subscribe. In short, we must walk before we can run; students cannot theorise about private land regulation if they have not seen the real documents that lawyers use in practice to create that regulation.

In addition to reading sample covenants, it is still necessary to teach case law, but technology can add the pieces missing in case books: most importantly hyperlinks to the legislation, the specific dealing the court was applying and visual imagery. This is the Moodle page that relates to enforcement and modification of covenants:

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<sup>24</sup> James A Kushner, 'Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States' (1979) 22 *Howard Law Journal* 547

<sup>25</sup> In my final year elective, *Land, People and Community*, we do a class on the limits of private governance and students are not let off so lightly. They read Gregory S Alexander, 'Dilemmas of Group Autonomy: Residential Associations and Community' (1989) 75 *Cornell Law Review* 1; R Natelson, 'Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association' (1990) 51 *Ohio State Law Journal* 41; C Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn From Traditional Doctrines of Property' (2013) 36(1) *University of New South Wales Law Journal* 280; and Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes Comments' (1981) 55 *Southern California Law Review* 1353.

### 3 Enforceability of freehold covenants

Although freehold covenants can operate as a quasi-planning regime, they are private property rights that depend on private enforcement; that is, if a breach of covenant is threatened, it can only be restrained by someone who has the benefit of the covenant, the original covenantee and/or their successors in title. Remember that restrictive covenants are equitable interests and thus the remedies granted will be equitable. The court will either grant an injunction to restrain a breach of the covenant or equitable damages in lieu. However, because equitable remedies are discretionary, if the damage sustained is negligible, a court may decline to grant a remedy.

Because most people would rather not sue their neighbours, restrictive covenants can often be more honoured in the breach than observance, and as a result, they can become outdated or obsolete. You have already learned in the easement chapter that s 89 of the *Conveyancing Act 1919* gives the Court a power to modify or wholly or partially extinguish an easement, profit à prendre or freehold covenant if satisfied of certain conditions. As s89 leads to the extinguishment of private property rights, courts do not readily grant s89 applications for modification or extinguishment.

To gain a better understanding of the real-world operation of a freehold covenant, read the following case on Austlii.

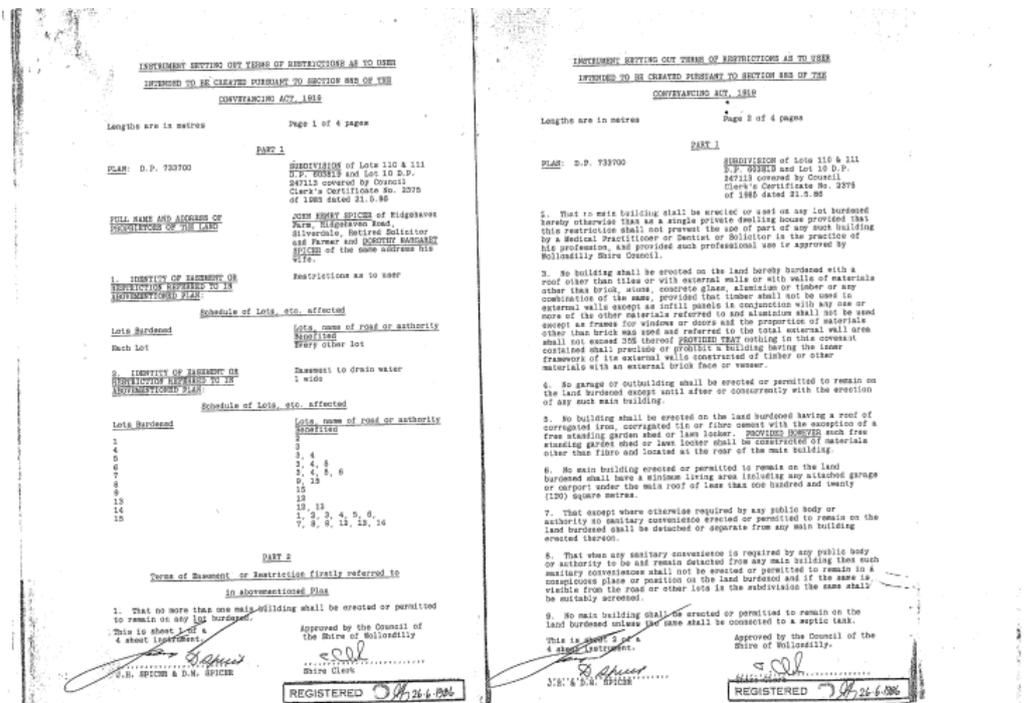
[Levi v Spicer \[2001\] NSWSC 924](#)

You can see what the subdivision in *Levi v Spicer* looks like (ie what the practical effect of the covenant is) on Google maps [here](#). Drag the little person to point "A" to see the street view.

The page includes hyperlinks to:

- the section of the Act that the case was dependent on so student can *read the section in full* in the context of the entire Act;
- the judgment;
- the actual streetscape that was the subject of the application.

The preceding page has the registered covenant:



None of this is rocket science, but neither is a lot of law. Law is practical, sensible and generally produces good outcomes for real people in the real world. If we do not

communicate this to our students about law, they will never really understand it and they will forever believe, as many lawyers do, that what they learned at law school 'had nothing to do with practice'.

### *Example 2 Contracts and transfers*

For twenty years I have struggled to explain to students the difference between a contract for the sale of land and a transfer of land. This is an incredibly basic distinction, but once we have taught them that specifically enforceable contracts create equitable interests, many students cannot seem to grasp that a contract for the sale of land is *an agreement to transfer* legal title at a later date, not the actual transfer of legal title.

With technology, I have finally solved this dilemma, (for most students, at least). Moodle has a 'forum' facility that allows students to post messages and pictures for each other and to communicate. I get my students to use it to buy and sell houses. They divide into vendors and purchasers. Vendors post pictures of a house with a simple description:

### How's the Serenity?

by Cathy Sherry - Thursday, 23 February 2017, 3:01 PM

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**Two bedroom country house \$550,000**

- Just under two hour's drive from Sydney
- Large dam and 50,000 litre water tank
- Close to local schools
- 5 acres, fully fenced

**Make the lifestyle change you have been dreaming about**



Purchasers then make private offers until a vendor accepts. All students must print out a sample standard contract of sale. This is on Moodle, along with a hyperlink to s54A of the *Conveyancing Act 1919* (NSW) (the NSW provision that requires contracts for land to be in writing and signed), and a media article about actress Toni Collette's failure to complete a binding contract of sale, (a real-world, relatable example).<sup>26</sup>

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<sup>26</sup> Stephanie Gardiner, 'Toni Collette loses legal stoush over Paddington home', *Sydney Morning Herald*, 31 May, 2013, <https://www.domain.com.au/news/toni-collette-loses-legal-stoush-over-paddington-home-20130531-2nfru/>

# 1 Fundamental concepts in land law

## 1.5 How does Contracts connect with Land Law?

In modern capitalist democracies, one of the most common ways to acquire land is to buy it (in contrast to feudal society where people would be more likely to inherit land from family members).

The first step in the purchase of land is a contract. For example, you might look at a house in Parramatta on a Saturday morning that you like, so you make the vendor an offer of \$800,000. They refuse. You then offer \$850,000 and they accept. This is contractual offer and acceptance. It is normal practice to pay a deposit of 10% of the purchase price.

### Writing: s54A Conveyancing Act 1919 (NSW)

In Principles of Private Law you learnt that because land is particularly valuable to individuals and the community, and because it is unique (no two parcels of land are the same, unlike two cases of coca cola), special rules apply to contracts for land. **The most important rule is that contracts for the sale of any interest in land must be in writing.** This means that if you go to court wanting to enforce a contract for the sale of land, (for example because the purchaser has changed her mind and is very sorry but she cannot buy your beautiful house: Toni Collette story <http://www.domain.com.au/news/toni-collette-loses-legal-stoush-over-paddington-home-20130531-2nfru/>), the first thing a judge will say is, "Show me the writing", ie show me that the promise that the purchaser or vendor made *in relation to land* can be proved with writing.

The requirement of writing for contracts for the sale of land used to be in s4 of the Statute of Frauds and is still often referred to as the Statute of Frauds. It is now in fact in s54A Conveyancing Act 1919. This is the legal requirement for contracts for the sale of land (because it is in a statute), and if complied with, will make the contract enforceable at law. Please click on the hyperlink and read the section for yourself.

Residential contracts for sale will usually be the standard Law Society blue form (reproduced with the permission of the Law Society of NSW and the Real Estate Institute of NSW with whom copyright vests). This contract can be altered, and sometimes vendors' solicitors will cross out terms that are less favourable to their clients. It is an offence to advertise residential property for sale without a prepared contract available for inspection. This provision was introduced to prevent 'gazumping', the practice of vendors verbally agreeing to sell land to a purchaser for a particular price and then accepting a higher offer from other person. If the contract is available from the first inspection, in theory if a vendor verbally accepts an offer, the purchaser can insist on the written contract being signed immediately and the vendor being bound. Should the vendor attempt to sell the property to another, the purchaser will have written evidence of their agreement in the signed contract.

We then fill in the contracts in class and physically exchange. It is chaos and I am not attempting to teach the 'lawyering task' of conveyancing. None of the mandated documents are attached to the contract of sale. However, what students *experience* and thus learn is that a valid contract must identify the parties (one purchaser or more? A company or a person? Joint tenants or tenants in common?); it must identify the property (by lot and deposited plan number, not just street address); it must stipulate the price and the date that the parties promise to carry out their contractual promises. Ideally, it should also clarify what is included in the sale to avoid disputes about what is and is not a fixture, (demonstrating that the doctrine of fixtures they have learned operates in the real world and in relation to pool equipment and curtains, not tapestries<sup>27</sup>). Finally, because both vendor and purchaser have printed out a copy and filled them in together, they have identical copies which they must sign and exchange; that is, they all end up holding in their hand the requirement of s54A of the *Conveyancing Act 1919* (NSW), an agreement in writing 'signed by the party to be charged'.

We then wait a week, (we do not have time to wait 42 days), in which I ask the purchasers how they are enjoying their equitable fees simple; are they liking living in the house or receiving the rent? The answer is of course no, and not simply because the house is imaginary. After a week, we settle the sale. If you have been to a settlement, the concept of settlement or completion of a contract is basic; it is a physical process with legal

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<sup>27</sup> *Leigh v Taylor* [1902] 1 Ch 615 is typically taught in land law courses as one of the leading fixtures cases. It concerned the question of whether valuable tapestries attached to walls with wooden frames were fixtures. One of the great impediments to students understanding land law is that a lot of the cases are old and relate to fact scenarios that are irrelevant in the modern world, inevitably creating the impression that the cases are irrelevant too.

consequences. But if you have never been to a settlement, as most law students have not, you are likely to leave land law without ever really understanding what the words 'settlement' and 'completion' mean, or how they relate to contract.

At our settlement, vendors bring mock certificates of title (I am yet to think through how I can teach e-conveyancing), and purchasers bring mock cheques and a real Torrens transfer form. The students fill in the transfer form, and then vendors give me, pretending to be the registry, the correct documents – the transfer and certificate of title. As evidence of the difficulty very bright, conscientious students can still have understanding this process, multiple students will always attempt to give me their contracts ('no, that is the private agreement between you and another citizen; it does not authorise the state to alter the register'), as well as their cheques, ('very generous, but I think the vendor may want that'.)

While this process may seem mundane and many academics might consider it better suited to practical legal training, I would argue that it is categorically impossible for students to understand some of the leading Torrens cases if they do not know what a contract, a transfer or a certificate of title certificate of title looks like, and they cannot engage in either deep learning or critical thinking about land law as a result. For example, *Breskvar v Wall* [1971] HCA 70; (1971) 126 CLR 376 is the Torrens case containing Barwick CJ's seminal statement that the 'Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration.'<sup>28</sup> It also deals with the important question of priorities between parties, neither of whom is registered.

The Breskvards borrowed money from Wall and as security for the loan they gave Wall the certificate of title and an executed a blank Torrens transfer form; that is, they signed their names in the transferors' section, but they left the transferee section blank. The mortgagee, Wall, dishonestly filled in his grandson, Petrie's name on the transfer form and registered the transfer. For non-land lawyers, this is a transfer form:

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<sup>28</sup> Barwick CJ at [15].

**PRIVACY NOTE:** Section 81B of the Real Property Act 1900 (RP Act) authorises the Registrar General to collect the information required by this form for the establishment and maintenance of the Real Property Act Register. Section 88B RP Act requires that the Register is made available to any person for search upon payment of a fee, if any.

**STAMP DUTY** Revenue NSW use only

**PLEASE NOTE!!!**  
This form **MUST** be presented to Revenue NSW **BEFORE** lodgment.  
[This notice will not print]

(A) **TORRENS TITLE**

(B) **LODGED BY**

|                         |  |                                |
|-------------------------|--|--------------------------------|
| Document Collection Box | Name, Address or DX, Telephone, and Customer Account Number if any | CODES<br><b>T</b><br><b>TW</b> |
|                         | Reference:   |                                |

(C) **TRANSFEROR**

(D) **CONSIDERATION** The transferor acknowledges receipt of the consideration of \$ \_\_\_\_\_ and in regards

(E) **ESTATE** the abovementioned land transfers to the transferee: **an estate in fee simple**

(F) **SHARE TRANSFERRED**

(G) **ENCUMBRANCES** (if applicable):

(H) **TRANSFeree**

(I) **TENANCY:**

**DATE** \_\_\_\_\_ Change execution

(J) **From the list below select the required form of execution by the TRANSFEROR**

- Standard
- Company with seal
- Company without seal
- Attorney
- Authorised officer of a company or of a government department or authority

Change execution

**From the list below select the required form of execution by the TRANSFeree**

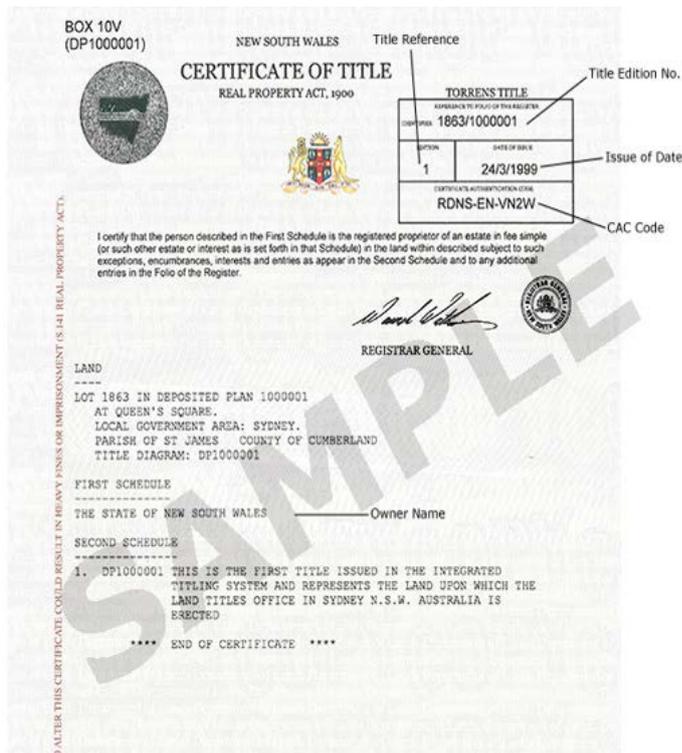
- Standard
- Company with seal
- Company without seal
- Attorney
- Solicitor, licensed conveyancer or barrister for the transferee
- Authorised officer of a company or of a government department or authority

(K) The **transferee** \_\_\_\_\_ certifies that the eNOS data relevant to this dealing has been submitted and stored under eNOS ID No. \_\_\_\_\_ Full name: \_\_\_\_\_ Signature: \_\_\_\_\_

\* s117 RP Act requires that you must have known the signatory for more than 12 months or have sighted identifying documentation.  
ALL HANDWRITING MUST BE IN BLOCK CAPITALS Page 1 of 1708

And this is a sample certificate of title:<sup>29</sup>

<sup>29</sup> Certificate of Authentication Code (CAC), <https://online.lpi.nsw.gov.au/wps/wcm/connect/SixPortal/find-records/find-records-searches/RET ITS16>.



Had nothing more occurred, the Breskvards would have been able to recover their land from Petrie, as Wall's actions constituted statutory fraud and Petrie was implicated. However, Petrie had signed a contract of sale with an innocent third party, Alban Pty Ltd. As a result, the case became a competition between an earlier unregistered, equitable interest (the Breskvards) and a later unregistered, equitable interest (Alban):

Breskvards → Wall/Petrie → Alban contract of sale  
Equitable interest Registered proprietor Equitable interest

The rule that applies is that the first in time prevails unless there is postponing conduct. The High Court held that the Breskvards' conduct was postponing because, in the words of Walsh J at [18], the Breskvards had 'empowered [Wall] to present himself to the world as absolute owner of the land and to execute a transfer to Alban'. Walsh J cited the judgment of Gavan Duffy and Starke JJ in *Abigail v Lapin* [1930] HCA 6; (1930) 44 CLR 166, where their Honours said at p 198 that a couple who had behaved in similar way to the Breskvards had 'armed' another to 'go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons', and that they were bound by the consequence of their own actions.

Students are very good at parroting phrases like ‘arming conduct’, but reading the case alone, it is unlikely that they can understand what this phrase means or why the Breskvars’ behaviour was at fault, ie ‘postponing’ (or even that ‘postponing’ means to have done something wrong). That is because the ‘arming conduct’ relates to mundane physical documents that students have probably never seen – a standard Torrens transfer form and a duplicate certificate of title. It is only when both are handed over the counter at the land registry that the state is authorised to alter the Torrens register, transferring title to land to the new owner. The new registered proprietor, in this case Petrie, then appears to anyone who looks at the register to be the absolute owner of the land. If students have never seen a transfer or certificate of title or witnessed the ordinary process of sale, they will not understand why the Breskvars’ actions were so risky.

*Breskvar v Wall* is just one case that relates to these physical documents. They are also crucial to understanding the leading case on gifts in equity, *Corin v Patton* [1990] HCA 12; (1990) 169 CLR 540. The doctrine from the case, as stated by Mason CJ and McHugh J at [37] is that ‘if an intending donor of property has done everything which it is necessary for him to have done to effect a transfer of legal title, then equity will recognize the gift’. It is difficult to see how students could ever understand this principle in relation to land if they do not know what owners of land have to do to ‘effect a transfer of title’; ie that they need to sign a transfer form and either hand it and the certificate of title over the counter at the land registry themselves or give the documents to someone else (which can be the donee) to hand over the counter. Students can frequently tell me that the donor ‘needs to have done everything that only the donor could do’ but they cannot extrapolate from that doctrine to identify that the two acts that logically ‘only a donor can do’ are i) sign the transfer and ii) get the certificate of title. These facts might be obvious to academics and practising lawyers, but they are not to students. As a result, unless we take the time to explain the mundane, nuts and bolts that operate in practice, students will not properly understand doctrine and consequently they cannot think either deeply or critically about it.

### *Example 3 – Mortgagee power of sale*

The cases and legislation on mortgagee power of sale are not particularly difficult. The law strikes a sensible balance between the mortgagee’s right to recover the money lent, relatively quickly and easily, and the mortgagor’s right to receive whatever is left over after the sale. Anyone who is familiar with property markets knows that property is not worth what the owner says it is worth; it is worth what someone is willing to pay for it. In the real world, defaulting mortgagor clients can find this emotionally and financially difficult to accept, but courts and legislatures, with the benefit of long experience, do not. As a result, both the case law and legislation focuses on *the process* of selling property, not the ultimate price. For example, the New South Wales legislative provision in s111A of the *Conveyancing Act 1919* states that:

(1) A mortgagee or chargee, in exercising a power of sale in respect of mortgaged or charged land, must take reasonable care to ensure that the land is sold for:

(a) if the land has an ascertainable market value when it is sold-not less than its market value, or

(b) in any other case-the best price that may reasonably be obtained in the circumstances.

We read that section in class carefully and good students are able to identify that the statutory duty is not to obtain the market value of property; the duty is to 'take reasonable care'. That is, the duty is about process, not outcome.

However, getting students who have no practical experience of the process of selling land to understand this concept is easier said than done. It is particularly difficult for them to understand why reserves are not definitive in mortgagee power of sale cases or how much of a sale is outside a mortgagee's control. So, instead of just *talking about* mortgagee power of sale cases in class, we *conduct* a mortgagee sale. The students are asked to read a number of case extracts from their case book, supplemented by real documents uploaded to Moodle that relate to a real house. They are then set an activity that they have to perform in class:

## 6 ^ Mortgagee Auction

The only way you will genuinely understand the law that relates to mortgagee sales is if you understand how property sales work in the real world. Judges understand property markets and it informs their application of the law. So, we are going to perform a mortgagee sale.

Can you please do all your reading for mortgages from S&N and come to class prepared to:

1. assess whether this [s57 notice](#) is valid;
2. devise (in class) an advertising campaign for the property, including writing the advertisement;
3. bid at a mortgagee sale (in class).

The house is 21 Dalmeny Ave Rosebery. This is a real house and the real owner **has not** defaulted on their mortgage (I don't want to cast aspersions on the real owner!) They don't even have a mortgage. But we are going to imagine that the fictitious owner, Frederick Allsop, has defaulted.

Look up 21 Dalmeny Ave Rosebery on [Six Maps](#) and on [Google Maps](#). You could also do a drive-by if you have time. Rosebery is about 5 minutes drive from the Law School.

The house is a freestanding, Federation bungalow on a 1,024 square metre lot. The house is partly renovated. That is, it is not in original condition, it has a modern kitchen and bathrooms, but it is not renovated to the highest standard it could be (ie you are not going to see it in Vogue Living). It is perfectly comfortable and liveable, but there is potential for further renovations. The house has 5 bedrooms, 2 bathrooms and 3 car spaces. The zoning in the area is 2A Low Density Residential (Sydney Local Environmental Plan 2012) (work out what this means).

This is the [computer folio search](#) for the property (altered for teaching) and this is the [covenant](#) listed in the Second Schedule.

So, come to class prepared, having thought what the cases and legislation in S&N might tell you needs to be done to exercise a valid mortgagee sale of this property.

### Advertising campaign

In class, divide yourself into groups and set out your advertising campaign by uploading a forum post here:

1. Where would you advertise the property, how often, who would you employ to help with the sale?
2. Write an ad for the property.

Refer to any cases and legislation which might be guiding your decisions about how to conduct a proper mortgagee sale.

Please put all your names (first and surnames) at the end of your forum post. I am not marking them, but I would like to know who has written what.

In addition to being given cases on s57 of the *Real Property Act 1900* (NSW),<sup>30</sup> students are asked to assess the validity of a notice ie to apply the law, not just read it, as a practising lawyer would. The students then have to devise an advertising campaign, which of necessity must be informed by what the case law indicates are failures on the part of mortgagees. They have to think about the case law with reference to a real house, (which they can see on the internet), a real restrictive covenant prohibiting subdivision (bought from the Torrens register and uploaded to Moodle) and a real planning instrument permitting dual occupancy. They have to think about timing of the sale and competent professionals who might be engaged to conduct the sale, all matters considered by judges in power of sale cases. They then have to estimate a sale price by using the internet to find the sold prices for comparable properties. All this concentrates the students' minds on the fact that the law operates in the context of a real property market.

We then auction the house in class. One student acts as the auctioneer and another as the mortgagee. The mortgagee and I set the reserve, communicating this to the auctioneer alone, as in practice. I give groups of students secret written bids, which tell them when they can bid, how much and why eg "Do NOT bid until the auctioneer says, 'The property is on the market'" ie the reserve has been reached; 'You have a \$500K deposit and bank approval for a \$1 million loan'; 'you have \$2 million but like another house better; you will only buy this house if you can immediately spend \$700K on renovations'. I engineer the auction to stall before the reserve has been reached and then the mortgagee agrees to proceed and the property is sold to the student, not with the most money, but who is prepared to pay the most. Students then reveal what their bids say, demonstrating that it is only the advertising process and conduct of the auction that is within the mortgagee's control; the mortgagee can influence but ultimately has no ability to determine who will come to the auction, how much money they have or how much they are prepared to pay. Students can see that the most influential person at an auction is not the mortgagee or even the ultimate purchaser; it is the second highest bidder, who pushes the purchaser up to their final bid. With this practical understanding of property sales, students can understand that the focus of the case law on process, not price, is logical and correct. Finally, because I choose a real house that is due to be auctioned, the students can discover what the house sold for. Being Sydney, in the midst of a seemingly never-ending property boom, the house invariably sells for more than we have estimated.

### *Conclusion*

Technological innovation takes time; time to source material, build sites and devise activities. Technical assistance from IT staff can help, but ultimately only academics can write academic content.

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<sup>30</sup> This section stipulates the notice a mortgagee must send a defaulting mortgagor before the power of sale arises.

In the modern university, time is the one thing most academics do not have. Our student numbers are bigger than ever and the pressure to publish and pull in research funding is greater than ever. It is hard to know how aware the legal profession is of the lie of the land in universities, but certainly students and the general public are not usually aware that teaching only makes up a fraction of our job. Considerable time is spent on administration, but the key element in our work is research. Universities have tried over the years to place greater value on teaching, and my University, in particular, is implementing significant changes to the teaching experience for students and staff alike.<sup>31</sup> However, it would be fair to say that across the university sector, the fastest way to progress as an academic is to devote as much time as possible to research. This inevitably comes at the expense of teaching and teaching innovation, particularly innovation that moves us away from long-standing methods of teaching and recalibrates teaching to legal practice.

I cannot offer any solutions to the complex, long standing problems in universities in relation to teaching and research. However, in relation to the more specific problem of how we better connect traditional doctrinal teaching to practice, I am sure that the key is interaction between the profession and the academy. We are not training students to do our job, we are training students to do the profession's jobs, in all their diversity. As increasing numbers of us have only briefly or never practised, the only way we can understand the profession is by interacting with practising lawyers, attending professional conferences, presenting legal education seminars, and inviting lawyers and other professionals to speak in our classes. Conferences like this are an invaluable opportunity for the profession and the academy to discuss what must be a joint endeavour: producing the best law graduates we can for the benefit of the Australian community.<sup>32</sup>

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<sup>31</sup> The UNSW Scientia Education Experience, <https://teaching.unsw.edu.au/unsw-scientia-educational-experience>.

<sup>32</sup> Readers wanting to know about fertile octogenarians in cyberspace might be disappointed to see that they are conspicuously absent from this paper. Fertile octogenarians are a prime example of excessive focus on doctrine in law schools and I would argue that the best way to teach them is to not teach them at all.