

- (e) Statutory extinguishment: s 89 *Conveyancing Act*; note *Treweeke* per Mason J as to whether section confers a discretion; note also that the question whether an easement is obsolete under s 89(1)(a) is approached in a similar way to the question of abandonment and will not be lightly inferred: *Long v Michie* [2003] NSWSC 233.

4. Omitted and misdescribed easements

- These obtain a partial exemption from indefeasibility: s 42(1) (a1) *Real Property Act*; S&N 10.115. Note there are two limbs to s 42(1) (a1) the wording of which is “in the case of the omission or misdescription of an easement subsisting immediately before the the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act”:
 - (a) All easements existing at the time the particular land in question was brought under the Torrens system which would include implied easements, easements of necessity, etc.
 - (b) Only easements “validly created” after the land was brought under Torrens title, which must occur under s 46 of *Real Property Act*, hence it would include and easement that had been validly created but was accidentally omitted from a newly issued certificate of title, but would not include implied easements, easements of necessity, etc.

Class 23 Freehold Covenants (Part 1)

1. Introduction



Figure 1 Sydney Harbour, Butler-Bowden and Pickett, "Homes in the Sky" (2007), 111

- (a) Proprietary not contractual and run with the land
- (b) Terminology: Covenantor = burden Covenantee = benefit
- (c) Distinguish:
 - The running of the burden of freehold covenants; and

- The running of the benefit of freehold covenants

(d) Distinguish freehold covenants:

- At Law; and
- In Equity

- As the owner and/or occupier of land, we are affected by what others do on the land around us. If our land is our home, we might be disturbed by noise from commercial activity on land next door; if a three storey building is erected next to us, we might lose light, privacy or a view; if the land next door is subdivided and a single neighbour is replaced by many, the amenity of our land might be reduced. If the enjoyment of our land is reduced, so too will its monetary value. As a result, land owners, in particular initial developers, have sought ways to control future use of neighbouring land through freehold covenants, commonly referred to as “restrictive covenants”.
- Freehold covenants are a difficult intersection of contract and property law. Imagine A owns a large block of harbour front land such as that in the picture above, (represented in diagram below). She decides to subdivide the land into four parcels, selling three parcels, (lots 2, 3 and 4), and retaining the land with the original Federation home, (lot 1). A could agree with the purchaser of lot 2, B, that B will never interfere with the harbour view by building above two storeys. This would be enforceable as a matter of contract law. However, if B then sells to B1, A will not be able to enforce the contractual agreement not to build above two storeys against B1, as B1 is not a party to the contract.

Lot 1: A → A1 (current Federation home)	Lot 4:
Lot 2: B → B1→B2 (vacant land)	Lot 3: C → C1 (apartment block)

- A needs to turn the contractual agreement with B into a property right that is enforceable not only against B, but against anyone who subsequently owns the land; e.g. B1, B2 etc. To properly safeguard the monetary value of her own land A also needs to make sure that the agreement can be enforced not only by her, but by anyone who subsequently owns her land, such as A1. In other words,
 - the burden of the covenant (the promise not to build above two storeys) must run with burdened parcel (lot 2) and
 - the benefit of the covenant (not having a view blocked) must run with the benefited parcel, (lot 1).
- In a subdivision such as the one above, you can probably see that more than one block of land could benefit from the restriction not to build above two storeys; Lot 4 would also benefit from not having its view blocked. When A sells lots 2 and 3, she could impose a restrictive covenant on them not build above two storeys for the benefit of lot 1 *and* lot 4, the lots she still owns. If done correctly, this restriction could be enforced by whoever subsequently owns lot 4 against whoever owns lot 2