

Topic 3: Inquiries and Adverse affectations

These are **implied warranties** in a contract for the sale of land. One warranty is that the land is not subject to an adverse affectation. Another is that the land does not contain any part of a sewer belonging to a recognised sewerage authority.

On the disclosure side of the contract, the vendor must attach diagrams showing the location of sewer lines, sewer mains, and sewerage infrastructure. If the land does contain any part of such a sewer, it must be disclosed.

The warranty and the disclosure obligation work together:

- If the vendor attaches the required sewer diagrams, they comply with the disclosure obligation.
- If the land contains a sewer and the vendor does not disclose it, the vendor is in breach of both the disclosure requirement and the warranty.
- If the land contains a sewer and it is disclosed, the vendor is not in breach of the warranty. Disclosure effectively “cures” the issue.

This is why contracts for sale of land routinely include sewer diagrams: the left-hand disclosure obligation and the right-hand warranty operate together, and disclosure prevents a breach of the warranty.

The vendor gives an implied warranty that *nothing about any building or structure on the land would justify council issuing an upgrading or demolition order*. In practical terms, this means the vendor is warranting that structures such as extensions, garages, pergolas, or other additions have proper council approval.

There is an important qualification:

If a structure might otherwise justify an upgrading or demolition order, the vendor will still satisfy the warranty *if a building certificate has been issued* for the property.

A building certificate is obtained by applying to council.

Council reviews a **survey of the land (showing boundaries and all structures)**, compares it with their approval records, and checks that each structure has been lawfully approved. If everything matches, council issues the certificate, confirming that all structures are compliant and not subject to demolition or upgrading action. Building certificate is good for 7 years.

If a very old structure appears without matching council records, council may exercise discretion, recognising that historic buildings were constructed under older laws or before comprehensive record-keeping. In such cases, the structure may be treated as exempt.

An **adverse affectation** is a matter that, if it applies to the land, may allow the purchaser to rescind the contract (subject to additional requirements). One category of adverse affectations includes *proposals* by statutory authorities (e.g., for road realignment, widening, rail work, land acquisition, or similar actions).

The key issue is whether something received by the purchaser is *truly a proposal*, rather than merely an invitation for discussion, community consultation, or preliminary correspondence. The legislation lists various authorities and types of proposals, but what matters in practice is the nature of the communication.

Case law provides limited guidance, but two principles help:

1. A proposal must be *more than mere unofficial speculation*.
2. A proposal usually involves an *intention that has been given force*, such as through a resolution, adoption, or other formal step giving the intention operative effect.

In exam scenarios, questions often ask whether the purchaser can rescind because the vendor failed to disclose a proposal. You argue both sides using the authorities and then form a conclusion based on whether the communication is sufficiently binding or formal to constitute a “proposal.”

The key question is what counts as a *proposal* for the purpose of adverse affectations. Courts distinguish between a mere informal intention and a genuine proposal that must be disclosed.

Adverse Affectation Warranty

- CSLR (2022) **Warranty in contract** Part 4 of Schedule 2 (adverse affection) is

In this warranty--

(a) land is

"subject to an adverse affectation" if an item listed in this Schedule, Part 3 applies in relation to the land, **and**

(b) an authority or other entity has a proposal in relation to land only if--

(i) the authority or entity has issued a written statement, and

(ii) the substance of the statement is inconsistent with the absence of a proposal of the authority or entity in relation to the land, **and**

(c)

"upgrading or demolition order" means the following—

(i) a Demolish Works Order specified in the *Environmental Planning and Assessment Act 1979*, Schedule 5, Part 1, item 3, in the circumstances described in the first, second and fifth bullet points in Column 2, or

(ii) a Restore Works Order, Compliance Order or Repair or Remove Works Order specified in the *Environmental Planning and Assessment Act 1979*. Or

(iii) an order to demolish or remove a building or an order to repair or make structural alterations to a building specified in the *Local Government Act 1993*.

Topic 6: Subject Matter of the Sale, Title Defects, Error and Misdescriptions

***** Travinto Nominees Pty Ltd v Vlattas.** → Applied Req/objection procedure step 5.

Travinto Nominees Pty Ltd v Vlattas establishes that a contractual clause referring to "errors or misdescriptions of the property" applies only to **physical misdescription of the land**, not to **defects in title**. The vendor's failure to disclose an **option to renew a lease** was a **title defect**, not a misdescription of the property itself, so the purchaser was **not entitled to compensation or rescission under the misdescription clause**.

At **common law**, Menzies J affirmed that **any difference, however trivial, between the land described and the land produced** entitled the purchaser to **rescind**. Under an **open contract**, the vendor is obliged to:

- Prove **good title in fee simple**,
- Place the purchaser in a position to be **immediately registered** (for Torrens title land), and
- Deliver **vacant possession on settlement**.

As explained in **Williams on Vendor and Purchaser (3rd ed 1965)**, equity later softened this harsh rule. Where the difference was **slight**, courts would order **specific performance with compensation** rather than rescission. However, if the deficiency was **substantial—so that the purchaser would receive something materially different from what was contracted for—equity would still allow rescission**.

Equity and Misdescription

Equity's Intervention → Introduced **compensation for deficiency**

Halsey v Grant (1806) ; If deficiency is:

- **Minor** → specific performance + compensation (cl 6)
- **Substantial** → rescission allowed (Flight v Booth)

Contractual Misdescription Clauses

Two types:

1. Allow compensation only
2. Exclude both rescission and compensation

Even with exclusion clauses:

Equity still allows rescission if misdescription is substantial

Description of Physical Land vs Title

Physical description may include:

- Markings on plans
- Physical suitability
- Title or interest errors are **treated differently**
- The contract must be carefully construed to determine:
 - Whether the **land itself** or
 - A **particular estate or interest** is the subject matter

Essential Subject Matter Cases

Silva v Tarval Pty Ltd (1990) NSW ConvR ¶55-533

The purchasers validly terminated the contract because the vendor was **unable to transfer the property as described at completion**. The description of the subject matter as a **unit in a luxury residential block that did not include commercial units** was held to be an **essential term** of the contract. Because what was delivered did not conform to that essential description, termination was justified.

Vella v Ayshan (2008) NSW ConvR ¶56-209

A special condition requiring the vendor to construct a residence **in a proper and tradesman-like manner and in accordance with council-approved plans** was held to be both a **description of the subject matter and a term as to quality**, and therefore an **essential term**. Substantial construction defects and multiple departures from the approved plans entitled the purchasers to **terminate at common law and recover their deposit**.

Contract for Sale of Land – Key Clauses Affecting Subject Matter

Clause 10 – Restrictions on rights of purchaser

Purchaser cannot object to:

- Dividing fences (10.1.1)
- Location of services (10.1.2)
- Party walls (10.1.3)
- Crown Grant reservations (10.1.6)
- Mining or exploration authorities (10.1.7)
- Disclosed easements and restrictions (10.1.8)

Exception:

- Sewer belonging to a recognised authority **must be disclosed**

Clauses 6–7

- Purchaser may claim **compensation for misdescription**

Clause 8

- Vendor may **rescind** in specified circumstances

Clauses 17 and 24

Property must be delivered:

- With **vacant possession**, or
- **Subject to tenancies**

Any lease must be:

- Disclosed
- Attached to the contract

Topic 11: Misrepresentation, Breaches of the Australian Consumer Law (ACL)

1. Misrepresentation at Common Law

Misrepresentation is a false statement of fact made before or at the time of contracting, which induces the other party to enter the contract. **There are three recognised categories:**

(a) Fraudulent Misrepresentation (Tort of Deceit)

Elements:

- A representation of fact that is false
- The representor knows it is false, or is reckless as to its truth
- The representation is intended to be acted upon by the other party
- The representee relies on it (inducement)
- The representee suffers loss or damage as a result of the reliance upon the fraudulent misrepresentation

Remedies:

- Rescission of the contract (contract is voidable), or
- Affirm the contract and claim damages

(b) Innocent Misrepresentation

- A false representation made without intention to mislead
- No knowledge of falsity and no negligence

Remedies:

- At common law: no damages
- In equity: may justify rescission or operate as a defence to specific performance

(c) Negligent Misrepresentation / Negligent Misstatement

- Arises where a duty of care exists
- Breach occurs by making a careless statement relied upon by another
- Authority: *L Shaddock & Associates Ltd v Parramatta City Council (1981) 150 CLR 225*

Remedies:

- Damages in tort

*** Anderson v Daniels (1983) NSW ConvR 55-144 →

Facts: The vendors (Daniels) sold a residential property in suburban Epping to the purchasers. The house was severely affected by **inadequate foundations** and **structural defects** which had caused large **cracks in the walls**. These defects had been **covered up with plaster and wallpaper** so they were not obvious to a buyer inspecting the property. The vendors were aware of these defects and the concealment, but they did **not disclose** them to the purchasers before the sale.

Legal Issue:

Whether a vendor's **failure to disclose major latent defects** in the property constitutes **fraud, active concealment or misrepresentation** such that the purchaser may obtain relief (e.g. rescission or damages), despite the general rule of *caveat emptor* ("let the buyer beware").

Held:

The case confirmed the principle that in a **land sale transaction**, mere silence by the vendor does **not automatically amount to fraud** under general law. However, if a vendor **actively conceals a defect** that they know about — such as deliberately covering up serious structural problems — that conduct may constitute **fraudulent concealment**, giving the purchaser a remedy.

- The vendor's **active concealment** of major defects can support a claim in **deceit/fraud** at common law.
- Vendors generally owe **no duty to volunteer information** about property defects (*caveat emptor*), but when they take steps to **hide defects**, that changes the legal analysis.

Key Principle in Conveyancing:

Under the general law, the vendor has **no obligation to disclose latent defects** unless they take steps to **actively conceal** them. *Anderson v Daniels* illustrates that **active concealment of serious defects can amount to actionable fraud**, even though the usual rule is *caveat emptor*.

L Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225 →

Facts: Shaddock & Associates (a property developer) were considering purchasing land in Parramatta for redevelopment. Their solicitor asked Parramatta City Council whether there were any **road-widening proposals** affecting the land. They made two enquiries: one **by telephone** and one **in writing** on an official council form used for conveyancing information. Council responded (in writing) with a certificate that **omitted any reference to road-widening proposals**, implying none existed. Based on this information, Shaddock purchased the land. It later turned out a **road-widening scheme did exist**, which significantly reduced the land's value. Shaddock sued the Council for **negligent misstatement causing financial loss**.

Legal Issue:

- **Does a municipal authority owe a duty of care in negligence** when providing information or advice, so that incorrect information causing pure economic loss can attract liability?
- Specifically:
 - Was the Council liable for its negligent advice?
 - Did it owe a duty of care to Shaddock even though there was no contract between them?

Held: The High Court allowed the appeal and held the Council **liable in negligence** for the written misstatement. Damages were awarded to put Shaddock in the position they *would have been in* had the negligent information not been given.

Topic 13: Mortgages, leases and other interests & Planning Law

8. Defences Available to the Mortgagor

A mortgagor may resist enforcement based on:

- Unconscionable conduct
- Undue influence
- Statutory protections
- Unfair contract provisions

9. Additional Resources

- NSW Land Registry Services – Registrar General's Guidelines (Creation and discharge of mortgages)
Referenced in the slides for further reading

Coles Myer NSW Ltd v Dymocks Book Arcade Ltd (1996) 7 BPR 14,638 →

- **Coles Myer** occupied premises within a large retail complex.
- **Dymocks** owned or controlled adjoining land within the same complex.
- Coles Myer sought an **easement of access and services** over Dymocks' land.
- Dymocks **refused consent**.
- Coles Myer applied to the Court under **s 88K** to have the easement imposed compulsorily.

Held: *Coles Myer NSW* confirms that under s 88K Conveyancing Act 1919 (NSW), an easement may be imposed where it is reasonably necessary for the effective commercial use of land, even if alternative means exist, provided the servient owner can be adequately compensated.

McGrath v Mestousis [2017] NSWSC 995 →

- The plaintiffs owned **32 Darwin Street, West Ryde** and proposed a **three-unit villa development**.
- The defendant owned the adjoining downstream property **31 Huxley Street, West Ryde**.
- Council granted **deferred commencement development consent**, requiring a **gravity stormwater easement** over downstream land before the consent could operate.
- Stormwater naturally flowed from the plaintiffs' land onto the defendant's land.
- Alternative stormwater solutions (pump-out, charged system, on-site absorption) were **unlikely to be approved** or would **substantially limit development**.

An expert engineer (court-appointed) concluded:

- The easement was **necessary for effective development**
- The proposed route along the defendant's western boundary was the **most reasonable option**
- The defendant **refused consent**, citing construction risk, disruption, and impact on services and structures.
- The plaintiffs applied for a **court-imposed easement under s 88K**.

Held: The Court held that the easement should be imposed under s 88K because it was reasonably necessary for the effective use and development of the plaintiffs' land. The proposed development was a reasonable and Council-approved form of development, and without the easement the land could not lawfully drain stormwater by gravity, as alternative systems were unlikely to be approved or would substantially restrict development. While the easement would impose some construction risk and temporary inconvenience on the servient land, those impacts were capable of being managed through appropriate engineering measures and did not sterilise or materially impede the servient land's use or future development. **The Court was satisfied that the servient owner could be adequately compensated in money for any loss or disadvantage, that the use of the dominant land with the easement was not inconsistent with the public interest, and that reasonable attempts to obtain consent had failed. In those circumstances, and notwithstanding some uncertainty in construction logistics, the Court exercised its discretion to impose the easement.**

PLANNING LAW NSW

1. Legislative Framework

- Land-use planning and development in NSW is governed by the **Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)**.
- The EP&A Act regulates the "**development of land**", defined broadly in s1.5 to include:
 - Use of land
 - Subdivision
 - Erection of buildings
 - Carrying out works
 - Demolition
 - Any act controlled by an Environmental Planning Instrument (EPI)
- Environmental Planning Instruments include:
 - Local Environmental Plans (LEPs)
 - State Environmental Planning Policies (SEPPs)