Conveyancing exam notes

Vendor's Duty of Disclosure; Caveat Emptor and Pre-Contract Enquiries (NSW) 2
INQUIRIES AND ADVERSE AFFECTATIONS 7
FORMATION OF AN ENFORCEABLE CONTRACT FOR SALE OF LAND + Exchange and cooling off 10
Exchange of Contracts; Deposits; Cooling-Off; Deposit Bonds; GST 14
SUBJECT MATTER OF SALE 16
Title Defects, Errors, Misdescriptions and Claims 18
TITLE DEFECTS 20
REQUISITIONS AND OBJECTIONS 22
Risk and Duty of Care Pending Completion 24
Legality of Structure and User 27
Rates and Notices (vendors duty) 30
VACANT POSSESSION 32
TIME FOR COMPLETION 34
MISREPRESENTATION 36
REMEDIES FOR BREACH 38
PLANNING LAW & CONVEYANCING 40
SPECIALISED TITLE SYSTEMS 43
MORTGAGES, LEASES & OTHER INTERESTS 46
E-CONVEYANCING 48
Role of Estate Agents 50
Adjustments and Settlement 54
Revenue Law 57
Scaffolds 63

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Vendor's Duty of Disclosure; Caveat Emptor and Pre-Contract Enquiries (NSW)

VENDOR'S GENERAL LAW DUTY OF DISCLOSURE

Core Position — Caveat Emptor
At common law Vendor must disclose:

- **Latent defects in title**

Vendor need not disclose:

- Patent defects
- Defects in quality (latent or patent)
- Planning restrictions (unless affecting title)
- Future possibilities
- Matters affecting value only

Mere silence ≠ fraud
Active concealment = misrepresentation

Only latent defects in title must be disclosed.
Everything else → purchaser must investigate.

Best v Glenville [1960] 3 All ER 478

- Property sold with an undisclosed latent defect in title.
- Defect not discoverable by reasonable inspection.

Principle: Vendor must disclose latent defects in title known to them.
No implied warranty that land is fit for habitation or particular purpose.

Dormer v Solo Investments (1974) 1 NSWLR 428

- Proposal lodged for future natural gas pipeline.
- Not yet legally operative at date of contract.

Principle: A mere possibility of future affectation is a defect in quality, not title. Vendor has no duty to disclose speculative future events.

Anderson v Daniels (1983) NSW ConvR 55-144

- House had serious structural cracking.
- Vendor patched cracks and falsely reassured purchaser.

Principle: Active concealment + misleading statements = fraudulent misrepresentation.
Active concealment is equivalent to a positive misrepresentation.

Tsekos v Finance Corporation of Australia (1982) 2 NSWLR 347

- Council had threatened resumption of properties.
- Not operative at date of contract.

Principle: Threatened resumption is not a defect in title until legally operative.
Affirms caveat emptor.

VENDOR'S STATUTORY DUTY OF DISCLOSURE

A. Conveyancing Act 1919 (NSW)
s 52A(2)(a) Vendor must attach prescribed documents* before purchaser signs.
s 52A(2)(b) Implied warranties deemed included in contract.
s 52A(4) Any attempt to exclude or restrict this section is void.
Purpose: shift burden from purchaser → vendor (anti-gazumping reform).

B. Conveyancing (Sale of Land) Regulation 2022
cl 4 & Sch 1 — Prescribed documents*
cl 5 & Sch 2 — Implied warranties
cl 21(1)(a) — 14-day rescission for missing documents
cl 21(1)(c) — Rescission up to completion for breach of implied warranty

*prescribed documents include:

1. **Planning certificate** (s 10.7(2) EPA Act)
2. **Sewerage service diagram**
3. **Property certificate (title search)**
4. **Plan of land**
5. Copies of dealings:
    - Easements
    - Restrictions on use
    - Covenants
    - Positive covenants
    - Crown reservations
    - Mortgages

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If strata/community title:

6. Strata plan
7. By-laws
8. Strata management statement
9. Community plan
10. Common property title

If leasehold: Registered lease

C. Swimming Pools Act 1992 & Regulation 2008

Vendor must attach:

- Certificate of compliance OR
- Certificate of non-compliance OR
- Evidence of registration

Failure may trigger rescission.

D. Home Building Act 1989

Relevant to:

- Statutory warranties (s 18B referenced in materials)
- Owner-builder liability

Verman v McLaughlin (1990) NSW Conv 55-521

- Failure to disclose up-to-date planning controls.

Principle: Failure to attach accurate planning certificate → rescission upheld.

Port Stephens SC v Booth (2006) 148 LGERA 351

- Holiday cabins near RAAF base.
- Council failed to warn of aircraft noise impact.

Principle: Council owes duty of care in issuing planning approvals and certificates. Negligent failure → damages.

Mid Density Developments v Rockdale MC (1993) 81 LGERA 104

- Council certificate stated land not flood-prone.
- Council records showed otherwise.

Principle: Council liable for negligent misstatement.
"Good faith" defence requires real attempt at accuracy.

Gibson v Francis (1989)

- Incorrect deposited plan attached.
- Correct plan supplied later.

Principle: Late supplementation does not cure breach.
Statutory right to rescind cannot be defeated by acknowledgment clause.

Argy v Blunts and Lane Cove Real Estate (1990)

- Zoning certificate attached was incomplete (missing pages).

Principle: Incomplete planning certificate = breach of implied warranty.
Purchaser entitled to rescind.

Pisano v Dandris (2014)

- Owner-builder sold "newly renovated" home.
- Major structural and water defects emerged.

Principle: Breach of Home Building Act s 18B statutory warranties.
Misleading conduct for "master built" representation.
Damages = cost of rectification.

Williams v Pisano (2015) 90 NSWLR 342

- Same property sale.
- Issue: whether sale was "in trade or commerce".

Principle: Single private residential sale not conduct "in trade or commerce" under ACL.

Pisano v Williams [2015] HCATrans 327

- Special leave sought to High Court.

Principle: Special leave refused. Private home sales generally outside ACL.

VENDOR CONTRACTUAL DUTY OF DISCLOSURE

This is distinct from the **common law duty** and the **statutory duty under s 52A.**

The contractual duty arises from:

- The terms of the **standard form Contract for Sale of Land**
- Any **special conditions**
- The incorporation of statutory warning notices

A vendor must:

(a) Accurately complete the contract

- Correctly identify:
  - Property type
  - Inclusions/exclusions

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Scaffolds

Vendor's duty of disclosure/caveat emptor, precontract inquiries

1. Issue

1. The purchaser alleges the vendor failed to disclose **[the matter]** prior to exchange/signing.
2. The issues are whether **[the matter]** is (i) a **defect in title** or merely **quality/value/use**, (ii) **latent or patent**, (iii) caught by the **statutory vendor disclosure regime** (Conveyancing Act 1919 (NSW) s 52A and the Conveyancing (Sale of Land) Regulation 2022), and (iv) whether any **pre-contract enquiry / reliance** point changes the outcome.

2. Rule

(A) General law: caveat emptor / vendor's duty

1. The starting point is **caveat emptor**: a vendor is not generally obliged to disclose matters affecting value or condition, and mere silence is not fraud absent concealment or misleading conduct (*Terrene Ltd v Nelson* (1937); *W Scott Fell & Co Ltd v Lloyd* (1906)).
2. The vendor generally need not disclose **patent defects in title** (*Becker v Partridge* (1966)) and need not disclose **defects in quality**, whether latent or patent.
3. However, a vendor must disclose **latent defects in title** that are not reasonably discoverable by the purchaser.
4. A vendor is not obliged to disclose a **mere future possibility** unless something "much more immediate and certain" has occurred (*Dormer v Solo Investments* (1974)).
5. A threatened resumption is not a title defect until it becomes operative because the vendor can still convey title up to that point (*Tsekos v Finance Corporation of Australia* (1982)).
6. Planning restrictions are generally treated as **quality, not title** (*Harris v Weaver* (1981); *Carpenter v McGrath* (1996)), though the characterisation can depend on what was promised as the subject matter (*Tambel v Field* (1982)).
7. If the vendor engages in **active concealment or misleading statements**, the vendor may be liable for misrepresentation (e.g. *Anderson v Daniels* (1983)), and misleading and deceptive conduct may also be available (ACL s 18; *Tiplady v Gold Coast Carlton* (1984)).

(B) Statutory vendor disclosure

1. Under **Conveyancing Act 1919 (NSW) s 52A(2)**, before the purchaser signs the contract the vendor must attach the **prescribed documents** and the **prescribed warranties** are deemed included.
2. The **Conveyancing (Sale of Land) Regulation 2022** requires attachment of the documents in **cl 4 and Sch 1** (relevant to the land) and provides the warranty regime in **cl 5 and Sch 2**.
3. Authorities in the notes show rescission rights where disclosure material is incorrect/incomplete: incorrect plan and later correction did not cure in *Gibson v Francis* (1989); incomplete planning/zoning material breached warranty and justified rescission in *Argy v Blunts* (1990); and planning certificate significance is illustrated in *Verman v McLaughlin* (1990).

(C) Pre-contract enquiries / reliance

1. Even with statutory disclosure, purchasers are expected to protect themselves with pre-contract enquiries (for example, building/pest, zoning/planning, sewerage, easements, strata records, adverse affectations, and legality of structures).

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