CONVEYANCING

LECTURE ON 21 MAY 2007

**Note:** Students should read the Chapters in Lang & Skapinker and the cases referred to in the Guide. These notes are NOT a substitute for reading the text and considering the cases.

I propose to deal with this topic in the following order:

- the contract for sale
- subject matter including fixtures and chattels
- vendor’s general law duty of disclosure
- vendor’s statutory duty of disclosure
- section 52A and the Conveyancing (Sale of Land) Regulation
- pre-contract enquiries

**Standard contract for sale of land 2005**

The contract for sale of land 2005 approved by the Law Society of New South Wales and the Real Estate Institute of New South Wales needs to be considered with the provisions of the Conveyancing (Sale of Land) Regulation 2005. Amendments were made to the Regulation on 1 May 2006 and these changes also need to be considered.

Section 66R(1) of the Conveyancing Act 1919 makes it an offence to indicate that a residential property is available for sale “by a written or broadcast advertisement” unless the “required documents” are all available for inspection by a purchaser. The “required documents” are defined by 66R(2) as being:

- a copy of the proposed contract for the sale of the property
- the documents required by section 52A to be attached to the contract
- (for options a copy of the proposed option)
so it is important to ensure that a contract is correctly prepared and has the documents required by section 52A. These documents are those set out in the Regulation, section 52A referring to the requirement to attach “such documents, ..., as may be prescribed”.

For this reason the Regulation requires careful attention to be sure that for any particular property the required documents are attached.

The provisions when considered together mean that any contract for sale must comply with section 52A, but contracts for the sale of residential land must be available at the time the property is advertised. While it is a good practice to prepare a contract for the sale of any property before it is offered for sale this is not provided for by section 66R.

The contract is in 3 parts:

• the front page on which there are spaces and boxes to be completed

• the second page where boxes are to be completed setting out the documents attached to the contract

• pages 3-12 containing some statutory notices on page 3 and then setting out clauses 1 to 29

The front page

The top part of the first page above the box is completed by the solicitor for the vendor before the contract is given to the agent to commence marketing.

The middle part within the bold box is to be completed when a purchaser is found. It may legally be completed by an agent although this should be discouraged. If an agent forwards a sales advice to the vendor’s solicitor then this part of the contract will be completed before the counterpart is forwarded to the solicitor acting for the purchaser.

It is important to check what is included in the sale and what, if anything, is excluded.

The bottom third of the page is for signatures and for Tax information. Vendor duty has been abolished and can be ignored. GST is important and while it will probably be covered in tax it is useful to dwell briefly on it here.
GST

Start with the assumption that all property you are acting on is subject to GST. Then examine whether the property you are dealing with fits within one of the categories of property that are not a taxable supply or are GST free.

“Old” residential property is not subject to GST. That is property that is already occupied or has been lived in as residential property. “New” residential property is generally subject to payment of GST although the vendor might not be carrying on an enterprise and might not be required to be registered.

Commercial property including vacant land is generally liable to payment of GST although the vendor might not be registered or required to be registered and may have no liability to collect or pay GST.

Farm land has special rules and land sold as part of a “going concern” will not be subject to the payment of GST.

You will quickly see that GST issues will need to be considered in all transactions and generally require advice from the client’s accountant to ensure that no unwanted liability arises unexpectedly.

**You will NOT be examined on GST.**

The second page

The first part of the second page is a list of documents some of which need to be attached to comply with the Regulation and some of which can be attached if they are available. The Regulation requires those numbered 1, 2, 6, and 9 to be attached in every case provided they are available. Some properties are not connected to a sewer and a sewer mains diagram will not be available. 10 is often necessary depending on what affectations are shown on the search.

For strata or community title lots the additional matters at 24 to 45 are to be attached as relevant.

The remainder of the second page contains some warnings, a note abut disputes and a note about sale at auction.

Pages 3-12
This page also contains a warning concerning finance and then sets out the Cooling Off notice required to be in all contracts for the sale of residential land. It is important to remember that cooling off rights only attach to contracts for the sale of residential property and not to all property.

The remaining clauses are as follows:

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<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Contains definitions and should be studied and understood</td>
</tr>
<tr>
<td>2</td>
<td>When the deposit is to be paid and what happens if it isn’t</td>
</tr>
<tr>
<td>3</td>
<td>No longer relevant as vendor duty has been abolished</td>
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<tr>
<td>4</td>
<td>When the transfer should be submitted and some other matters</td>
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<tr>
<td>5</td>
<td>Requisitions</td>
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<td>6</td>
<td>Error or misdescription</td>
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<td>7</td>
<td>Claims by purchaser</td>
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<tr>
<td>8</td>
<td>Vendor’s right to rescind</td>
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<tr>
<td>9</td>
<td>Purchaser’s default</td>
</tr>
<tr>
<td>10</td>
<td>Restrictions on rights of purchaser. This contains many tricky things and should be read and understood. (The matters in here would make good exam material.)</td>
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<tr>
<td>11</td>
<td>Compliance with work orders</td>
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<td>12</td>
<td>Certificates and inspections</td>
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<td>13</td>
<td>GST (You will not be examined on GST)</td>
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<tr>
<td>14</td>
<td>Adjustments</td>
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<td>15</td>
<td>Completion date</td>
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<td>16</td>
<td>Completion</td>
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<td>17</td>
<td>Possession</td>
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<td>18</td>
<td>Possession before completion</td>
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<td>19</td>
<td>Rescission of contract</td>
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<td>20</td>
<td>Miscellaneous (another source of good exam material)</td>
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<td>21</td>
<td>Time limits</td>
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<td>22</td>
<td>FIRB</td>
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<td>23</td>
<td>Strata or community title</td>
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<td>24</td>
<td>Tenancies</td>
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<td>25</td>
<td>Qualified, limited and old system</td>
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<td>26</td>
<td>Crown purchase money</td>
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<td>27</td>
<td>Consent to transfer</td>
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<tr>
<td>28</td>
<td>Unregistered plan</td>
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<tr>
<td>29</td>
<td>Conditional contract</td>
</tr>
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</table>

Subject matter including fixtures and chattels
What is the subject matter of the sale? It is easy to say that it is the land, or perhaps the land and what is fixed to it. In Real Property we looked at the question of whether items that were chattels became fixtures and would be included in a sale of the freehold and also the possibility of arguments over whether items that were not specified were fixtures or chattels.

Remember *Palumberi v Palumberi* where the brothers were arguing over blinds, a free standing cupboard, carpet fixed by runners and a plug in stove. These are the arguments you don’t want to have, so it is important to obtain adequate instructions from both vendor and purchaser clients to clarify before contracts are exchanged exactly what the vendor is expecting to sell and leave behind and what the purchaser is expecting to be there after completion.

It is equally important to consider what property is included. This means the land and any buildings on it. Are there encroachments by or upon the land?

In *Nicita v Moloney* (1971) 1 BPR 9105 the Court of Appeal considered whether the ‘subject matter of the sale’ was the land and the building erected on it or the building and the land on which it was erected.

The description in the contract (1965 edition) read:

> ALL THAT piece or parcel of land situate in the municipality of Ryde Parish of Hunters Hill County of Cumberland being Lot 1 in Deposited Plan No. 15806 and being the whole of the land comprised in Certificate of Title Volume 4257 Folio 193 and being the property also known as 20 Pittwater Road, Gladesville.

The property comprised a two storey building which although within the boundaries of the land at ground level, leaned towards the rear and at the ceiling of the second floor encroached onto the road. The purchasers argued that as the building was not totally within the land they were entitled to rescind the contract and have the deposit returned. The vendors disagreed. In the District Court an order was made for a refund of the deposit and for survey and legal costs thrown away. The vendors appealed.

In his judgement Jacobs JA said1:

> It is first necessary to identify the subject matter of the sale. The subject matter must primarily be identified from the construction of the written

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1 Pages 9106-9107
instrument although in some cases extrinsic evidence would be admissible to identify references in the written instrument.

... I am of the opinion that the property agreed to be sold in the present case was the piece or parcel of land described in the particulars being Lot 1 in Deposited Plan 15806 and being the whole of the land comprised in Certificate of Title Volume 4257 Folio 193. The additional words in the Description of the property are “and being the property known as 20 Pittwater Road, Gladesville”. It has been submitted that by these words the description of the property is extended to cover the whole of the building, the base of which lies within the boundary of the land as described in the particulars of the property. I cannot so conclude. No doubt it was the intention of the parties to pass with the land all buildings upon the land. That, however, is not quite the same as promising to sell a particular building and to make title to that building.

Four years later in *Abraham v Mallon* (1975) 1 BPR 9157 Holland J considered a similar issue in relation to an old system property where the description read:

> ALL THAT piece or parcel of land ... upon which is erected the premises known as No 28 Sharp Street, Cooma together with all improvements thereon ... 

Contracts were exchanged on 21 February 1974 and the matter dragged on until September 1974 when the purchasers’ solicitor obtained a survey report showing that the house was within the boundaries but the garage encroached between 0.03 and 0.04 metres onto adjoining land and the brick toilet encroached between 0.25 and 0.32 metres onto adjoining land with an eave encroaching a further 0.09 metres.

The vendors argued that the words in the description referred to the land and what was constructed on it. That is, the cottage and those parts of the garage and WC on the land. The purchaser said that the description “the premises known as No 28 Sharp Street, Cooma” should mean the cottage, the garage and the WC.

His Honour said:

> The vendors’ argument as to the subject matter of the sale is that the court is confined to the words of description in the contract which should be given their literal effect if that is possible as, it is said, is the case here. In my opinion, whilst the words chosen by the parties to describe the property sold must primarily determine the subject matter of the

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2 Page 9161
sale, a court, in interpreting the words used, is not bound to disregard what the vendor had for sale, ie what was physically there for sale.

... to say that the vendors ... have been selling with the cottage about three quarters of a WC and nearly all of a garage. This construction exceeds the limits to which I could bring myself to go in the cause of giving literal effect to words used to describe the subject matter of the sale in a contract for the sale of a residence.

In *Avim v Guilianotti* (1989) NSW ConvR 55-479 and (1989) ANZ ConvR 484 Young J considered whether what was sold included the building on the land or just the land itself described as “329 KING STREET, NEWTOWN”. The part of the front page of the contract detailing the particulars of the property to be sold did not refer to any building and only gave the address and the title reference. In considering what was included in the sale His Honour said³:

The space provided for someone to include a reference to the building or other improvements on the land or to furnishings and chattels have been left completely blank. Accordingly, if one was looking to the description of the property, there would be no case at all for saying that the purchaser was buying anything else than the land.

... It is, of course, possible to go outside the particulars in sec. F of the contract to find out what was sold and to go to other parts of the contracts and perhaps even outside the contract, the crucial matter is the description of the property in the contract.

Clear instructions should always be obtained on what is to be included in the sale, including garages, lawn lockers, and other improvements that might, or might not, be fixtures, and inclusions. If there is doubt concerning whether all improvements are within the title boundaries then a survey should be obtained before the property is offered for sale. If encroachments are discovered, proper disclosure can be made and provisions dealing with those encroachments added to the contract.

We will deal with the implied warranty and conditions imputed into contracts by the Regulation shortly.

**Vendor’s general law duty of disclosure**

The vendor does not have to make any warranty to the purchaser concerning the land or the improvements and:

- their fitness for habitation

³ Page 487-488
whether the land can be used for the purpose the purchaser proposes
that the present use by the vendor is a legally permitted use.

In **Best v Glenville** [1960] 3 All ER 478 the English Court of Appeal considered this issue arising out a sub-lease of premises for use as a bridge club. At the time the lease was being negotiated both the lessor and lessee knew that the use of the premises as a club required planning permission. Despite not having either the consent of the head-lessee to the sub-lease, or planning permission, Mrs Glenville occupied the premises and opened her club. A subsequent application for planning permission was refused and Mrs Glenville ceased to pay rent.

When Mr Best, the sub-lessor sued for rent, Mrs Glenville argued that the sub-lease was illegal as no planning permission existed.

Ormerod, LJ said in his judgement dismissing the appeal⁴:

> It was also found by the learned county court judge that the proper inference to be drawn from the evidence of the plaintiff was that he would not have let the premises had he known they were going to be used without planning permission. In those circumstances for my part I find it very hard to see what there is illegal in the contract so far as the plaintiff is concerned. He let the premises for a perfectly proper purpose, i.e., for their use as a club, as he was entitled to do. There was no duty on him to obtain planning permission.

The general proposition was, and probably still is, *caveat emptor*, let the buyer beware. As there is no fiduciary relationship between a vendor and purchaser while they are negotiating the terms of a sale, there is no obligation to make the purchaser aware of matters that affect the value or subject matter of the sale. It is up to the purchaser to make whatever enquiries are necessary to enable the purchaser to decide whether to purchase and whether the price asked is reasonable.

This has been modified to some degree by the Regulation, and I will deal with this later.

In **Dormer v Solo Investments Pty Ltd** (1974) 1 NSWLR 428 Holland J was asked to make a declaration that the purchaser, Dormer, could rescind a contract for a failure by the vendor to disclose to the purchaser prior to exchange that AGL was investigating whether to construct a gas pipeline across the land being sold. The evidence showed that the vendor was aware of the proposal but it was exactly that, a proposal to

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⁴ Page 481
investigate whether the route would cross the land. Should the vendor have made the purchaser aware of the proposal? His Honour said:

The case for a right to rescind is based on no more than silence by the vendor as to a future possibility of which he was aware. The vendor is presently able to give fully the title to the land which he contracted to give. The existence of the possibility could presently affect only the current market value of the property and would not necessarily affect that...

It seems to me that the general rule in contracts of sale and purchase is still undoubtedly caveat emptor.

...No doubt there is a duty on the vendor to disclose presently existing latent defects of title, that is to say matters within his knowledge which detract from his right to convey the estate he has agreed to sell or which prevent him from conveying his title free of encumbrances.

...In my opinion, it is not the law that the defendant in the present case had a duty to the plaintiff to disclose the knowledge that it had, and, therefore, the plaintiff would not, in my opinion, be entitled to rescind on the ground of that non-disclosure.

His Honour did refer to a potential moral obligation to disclose such information, but found that there is no corresponding legal obligation. If the proposal had become a reality then this would amount to a defect in title and bring with it a right to rescind. Such affectations are now dealt with in the Regulation although Dormer remains authority for the general proposition.

Similar facts were considered by Rath J in *Tsekos and Another v Finance Corporation of Australia Ltd* (1982) 2 NSWLR 347. FCA was a mortgagee in possession and negotiated a sale of three properties in Marrickville to the plaintiffs exercising its power of sale. Contracts for the sale were exchanged on 2 June 1977. Prior to that date FCA had been in correspondence with the council concerning a possible sale to council. Council had threatened to make an application to the Governor for resumption.

Prior to exchange, the purchaser became aware of demolition notices issued by the council and the purchasers’ solicitors wrote to council and received a reply granting additional time for compliance. No mention was made of any intention to resume.

After exchange council made a further offer to FCA which replied that it had exchanged contracts and could not accept the offer. Council
subsequently resolved to resume the properties and the plaintiffs (Tsekos) terminated the contract relying upon the notice of the proposal to resume. FCA subsequently sold the properties to council without a resumption taking place.

Rath J held that a threat of resumption was not a misdescription and said\(^6\):

> ... I am unable to see how the threat of resumption in the present case gives rise to a misdescription of the subject matter of the sale. At the date of the contract the properties answered the description in their respective contracts.

(After referring to the purchasers’ expectations)

> Such expectations, and the defendant’s awareness of them, are not in any relevant sense surrounding circumstances to which regard may be had in construing and applying the contractual descriptions: ...

> The threat of resumption, as it existed at the date of the contracts, is not in my view a defect in title.

The active concealment of defects falls into a different category. In *Anderson v Daniels* (1983) NSW ConvR 55-144 Mr & Mrs Daniels owned a property at Epping having acquired it in 1975. The property was badly affected by cracking. They did not live in the property but rented it to tenants. In August and November 1976 and again in August 1977 they had a plasterer repair the cracks. After the last occasion they had the interior painted. Mr & Mrs Daniels inspected the property on several occasions and on one of these occasions noticed some external cracking. Having raised this with Mr Anderson the response was “Yes, all brick houses have settling cracks.” When commenting on the lack of marks on the interior walls the vendor responded that there had been no children living in the house.

After completion further cracking appeared and the Daniels sued. Robson J found for the plaintiffs in the District Court and the vendors appealed. After detailing the facts Samuels J.A. went on\(^7\):

> The plaintiffs did not assert that the defendants had expressly represented that the building was in a sound structural condition and its walls free from cracking. The claim made was that they had actively concealed the fact that the walls were prone to cracking and thus concealed the underlying cause which that susceptibility manifested.

\(^6\) Page 354

\(^7\) Page 57,054-57,055
The principle, which seems to me is accurately set out in *Salmon on Torts*, 17th ed. At p. 388, is in these terms:

“Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact being discovered; for example, to cover over the defects of an article sold with intent that they shall not be discovered by the buyer has the same effect in law as the statement in words that those defects do not exist.”

Vendor’s statutory duty of disclosure

The Conveyancing Act 1919 and the Conveyancing (Sale of Land) Regulation 2005 provide the basis for the vendor’s statutory obligations to disclose certain matters in relation to property that is for sale. The Act in section 52A provides:

**SECTION 52A  CONTRACTS FOR THE SALE OF LAND**

(2) **[Vendor’s obligations]** A vendor under a contract for the sale of land:

(a) shall, before the contract is signed by or on behalf of the purchaser, attach to the contract such documents, or copies of such documents, as may be prescribed; and

(b) shall be deemed to have included in the contract such terms, conditions and warranties as may be prescribed.

(4) **[Section cannot be excluded]** Except in so far as the regulations may otherwise provide, a provision, whether in a contract for the sale of land or any other agreement:

(a) which purports to exclude, modify or restrict any provision of this section or a regulation made for the purposes of this section; or

(b) which would, but for this subsection, have the effect of excluding, modifying or restricting any such provision, is void.

The result is this:
Before the contract is signed by the purchaser, the vendor shall attach to the contract the prescribed documents, and, the contract has in it the implied terms conditions and warranties set out in the regulation (whether written in the contract or not), and the vendor can’t attempt to exclude these terms conditions or warranties.

The remaining subsections of 52A should be read and understood. This is good exam material.

The Conveyancing (Sale of Land) Regulation 2005 came into effect on 1 September 2005 and has been amended from 1 May 2006. It is constantly necessary to keep watch for amendments as they can appear at any time. It is only necessary to gazette an amendment to the Regulation in the Government Gazette for it to come into force. For exam purposes, the Regulation as at 1 May 2006 is the version you will need. If there are amendments between now and the exam you won’t be examined on those changes.

The Regulation

The following table sets out a summary of some of the Regulations provisions:

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<thead>
<tr>
<th>Clause</th>
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<tr>
<td>3</td>
<td>Definitions</td>
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<td>4</td>
<td>Prescribed documents</td>
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<tr>
<td>5</td>
<td>Implied term – all contracts</td>
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<td>6</td>
<td>Implied term – strata units bought “off the plan”</td>
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<td>7</td>
<td>Implied term – “land and house” packages</td>
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<td>8</td>
<td>Implied warranty</td>
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<tr>
<td>12</td>
<td>Form of statement relating to cooling off period</td>
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<td>19</td>
<td>Circumstances under which purchaser may rescind contract or option</td>
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<td>20</td>
<td>Method of rescinding contract or option</td>
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<td>21</td>
<td>Effect of notice of rescission of contract or option</td>
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<tr>
<td>22A</td>
<td>Offence relating to smoke alarm notices attached to contracts of sale</td>
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<tr>
<td>Schedule 1</td>
<td>Prescribed documents</td>
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<td>Schedule 2</td>
<td>Prescribed terms</td>
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<td>Schedule 3</td>
<td>Prescribed warranties</td>
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<td>Part 1 – Warranty in contract</td>
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<td></td>
<td>Part 3 – Adverse affectations</td>
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<td>Schedule 4</td>
<td>Exempt contracts</td>
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<td>Schedule 5</td>
<td>Exempt land</td>
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<td>Schedule 6</td>
<td>Forms</td>
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While the whole Regulation is critical to conveyancing transactions in New South Wales, the clauses and schedules listed are of more relevance to this course.

I do not intend to deal with each clause in detail but will discuss some of them.

In *Gibson & anor v Francis & anor* (1989) NSW ConvR 55-458 an attempt was made to raise an estoppel against a rescission by a purchaser for failure by the vendor to attach the correct deposited plan to a contract for a sale at auction. The property was correctly described as Lot 3 in DP 236968, but for some reason a copy of DP 236966 was attached to the contract. After the auction and before the expiration of 14 days the vendors’ solicitors forwarded a copy of the correct DP to the purchasers’ solicitors. They responded by rescinding the contract for breach of the obligation to attach the prescribed documents.

The contract included a clause 12(a) in the following terms:

> The purchaser acknowledges that before this agreement was signed by or on behalf of the purchaser, the vendor attached to it pursuant to s52A(2)(a) of the Conveyancing Act 1919 the documents or copies of the documents referred to in the fourth schedule.

The case was under the 1986 regulation and some of the references to schedules are different. Counsel for the plaintiffs attempted to argue that by signing the contract, containing clause 12, the purchasers created an estoppel preventing them from benefiting from the regulation as they knew, or should have known, that the correct DP was not attached.

In his judgement dismissing the application for specific performance by the vendors, Studdert J said:

> It is submitted by Mr Garling that the legislative provisions above reviewed give a qualified right to rescind. The purchasers, upon a breach by the vendor of sec. 52A(2) have the choice of proceeding to completion or avoiding the contract provided that should they wish to pursue the latter course they elect to do so within 14 days as required by reg.7. Hence it is argued by Mr Garling that by executing the contract containing cl. 12(a) the defendants waived their right to rescind. Alternatively, having executed the document notwithstanding the wrong attachment they are stopped by their acknowledgement in cl. 12(a) from asserting any right to rescind.

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8 Pages 58,318-58,319
I must reject these submissions.

... The statutory obligation arising under sec. 52A(2) is of an unconditional character clearly aimed at protecting the purchaser and providing him with rights. It seems to me in the face of this statutory scheme, bearing in mind the above authorities, that the vendor cannot through the device of a clause such as cl. 12(a) seek to set up an estoppel against the purchasers.

Similar issues were dealt with by Hill J in the Federal Court in *Argy and anor v Blunts & Lane Cove Real Estate Pty Ltd and ors* (1990) 94 ALR 719. Mr and Mrs Argy purchased a property at Lane Cove following an unsuccessful auction. The copy of the contract signed by the Argys as purchasers had an incomplete 149 certificate in that it had one page duplicated and another page missing. The copy signed by the vendors attached the correct original certificate. The action involved many issues under the Trade Practices Act the Fair Trading Act and also dealt with the entitlement of the purchasers to rescind under the 1986 regulation.

In his judgement Hill J came to the following conclusion⁹:

> I am of the view, consistent with what each party now effectively concedes that in the circumstances of the present case the applicants are entitled to rescind the contract and to recover against the vendor the deposit paid.

> ...

> No other damages would be payable by the vendor to the purchasers under 52A of the Conveyancing Act 1919 or as a result of a rescission pursuant to cl 12 of the contract.

While the contract is now quite different to that in use in 1990 and the Regulation has changed several times these decisions still appear to represent the law. It is necessary to be extremely careful when preparing contracts to ensure that the requirements of the Regulation are met completely and that contracts are not exchanged without the prescribed documents attached.

In earlier notes Scott Freidman (the previous lecturer) comments that as a solicitor for a vendor you should not alert a solicitor for a purchaser if you become aware of a deficiency in the documents during the 14 day period. There appears to be no obligation to do so and it is more likely that a vendor could take action against you if giving notice or serving a further correct copy of a document allowed a purchaser to rescind within the 14 day period.

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⁹ Page 749
Pre contract inquiries

In the CCH service New South Wales Conveyancing Law and Practice the author, Andrew Lang, provides a checklist of those matters he believes should be the subject of pre-contract inquiries. (While generally the words ‘enquiries’ and ‘inquiries’ are used interchangeably, the dictionary says that ‘enquire’ is to ask generally while ‘inquire’ is to conduct a more formal investigation.)

At paragraph 5-450 Lang refers to the need to make inquiries concerning matters that do not have to be disclosed. I have already mentioned matters of quality and in particular whether a building is structurally sound or not and whether there are problems with white ants or borers. To try and protect a purchaser, and to some extent yourself, every purchaser should be advised of the need to obtain pest and building reports. These should be ordered by the client and read and understood by them.

It is not satisfactory for the solicitor to read the report and be happy with it as the client’s expectations may be quite different to that of the solicitor. An old house may produce a report of many pages but show up no serious matters. A new house may have a short report highlighting major deficiencies.

The following is a draft letter developed some years ago by my partner to try and find out some further information. It should never be used without thought, and the information requested may already be attached to the contract. Be careful not to ask for information you already have before you.

I confirm that I am acting for the Purchaser in this matter and ask that you forward a Contract to me at your earliest convenience.

I look forward to receiving from you the following information or copies of documents:

1. A copy of any survey report identifying the location of boundary fences and the improvements upon the property. If a copy survey is provided, please confirm whether the survey pre-dates any further improvements and, if it does, identify those improvements.

2. Copy of any Building Certificate issued by the local council.

3. Please confirm that all improvements are the subject of an approval from the local council, Hunter Water and the Mines
Subsidence Board. Please confirm that all improvements have been constructed in accordance with any approval.

4. Please indicate the approximate date of construction of each of the improvements and the date of any alterations or additions.

5. If any improvements, alterations or additions have been made since 1 May 1997, please provide a copy of the Home Owners Warranty Insurance Certificate.

6. Please advise whether any non-habitable area has been converted to a habitable are.

7. Please confirm whether any plumbing, drainage and/or sewerage works have been carried out since the improvements were constructed and whether those works were carried out with approval.

8. Please provide details and evidence of any termite barriers used during construction.

9. Please advise whether the vendors have received any notices from any statutory authority or any correspondence concerning the issue of any such notice, or whether the vendors are involved in any legal proceedings, or aware of any proposed proceedings, involving the property or their ownership of it.

In addition to these matters always ensure that your client has sufficient funds to complete the purchase, whether their own funds or a finance approval.

The real dilemma in pre-contract inquiries is how far do I go? It is possible to inquire concerning almost anything, but will I find out something of relevance or just delay exchange for an unacceptable time? The answer lies in experience and an ability to work out what matters are relevant to the contract at hand.

In *Hillpalm Pty Limited v Heaven’s Door Pty Limited* [2004] HCA 59 the High Court considered the issue of an unfulfilled condition of consent relating to a subdivision many years before the contract that lead to the action coming before the court. The condition required the creation of a right of way to allow access from a property to a road and the construction on that right of way of a track 2.5 metres wide.

At the time of the purchase there was no notation on the title of the land purchased by Hillpalm and the right of way did not exist. If the plaintiff had been successful, then the defendant would have had to construct the
track and create the right of way. While the plaintiff was successful in the Land & Environment Court and the Court of Appeal, the defendant was successful in the High Court. The majority judgement was written by McHugh ACJ, Hayne and Heydon JJ, with Kirby and Callinan JJ writing very strong dissenting judgements.

During the Court of Appeal hearing one of the judges commented that it would be necessary for solicitors to inquire from Councils concerning unsatisfied development consent conditions, not only for the most recent subdivision but also for earlier ones. While this is satisfactory in theory, in practice it is impossible with many Councils records being unsatisfactory and difficult to access, and in some cases, council being unable to say if there are unfulfilled conditions.

Notwithstanding the difficulties, it is sometimes necessary to look at council records and check the conditions of consent.

Although written before the High Court decision, the article *Indefeasibility Overridden – Significantly* by Peter Butt and Scott Freidman (2003) 77 ALJ 88 is helpful in setting the scene.

A different disclosure problem arose in *Adderton v Festa Holdings Pty Ltd and ors* [2003] NSWSC 1065. At the time contracts were exchanged the Home Building Act 1989 required that a contract for the sale of a new residential dwelling was not to be entered into unless a Home Owners Warranty Certificate of Insurance was attached to the contract. The position has changed since this case as the Home Building Act has been amended to provide for a right of rescission if no certificate is attached. This only helps the first purchaser however and does not protect subsequent purchasers.

One of the questions before the judge was whether the failure of the vendor to attach insurance was a defect in title. Gzell J said\(^{10}\):

> I doubt that the absence of such insurance goes to the title to the property. The first defendant contracted to acquire clear title to land and dwelling. There was no impediment to it acquiring that title.

> In *Sullivan v Dan* (1996) 7 BPR 14,974, Bryson J held that a lack of compliance with the conditions of a development consent by a local council was not a defect in title. I regard a lack of insurance, if required, in like vein.

\(^{10}\) Para 23-24
In *Festa Holdings Pty Ltd & Anor v Adderton & Ors* (2004) ANZ ConvR 341 the Court of Appeal considered the appeal.

The issue before the Court of Appeal was whether the vendor, as the second vendor of the property since the building works had occurred, had any obligation under the Home Building Act, or for any other reason, to attach or provide a certificate of Insurance. Mason P considered the provisions of the Home Building Act 1989 and the scheme of insurance under that Act.

He found that while it is clear that the first vendor which had carried out the building work, or had it carried out, was required by the Act to attach a certificate of insurance, the second vendor (the vendor in this matter) had no such obligation. He said:

None of these provisions imposed any duty upon the present vendor. He was a successor in title to the original building owner, Windy Dropdown. As such, he acquired rights to enforce the statutory warranties against the original building contractor and he would have been a beneficiary of the insurance contract taken out by the original building contractor had this occurred. But no obligation was placed on him by the Act.

Nor is any such obligation to be found in the vendor disclosure and statutory warranty provisions of the Conveyancing Act 1919 (sec 52A), the Conveyancing (Sale of Land) Regulation 2000 or any other statutory provision regulating conveyancing practice.

...There is much case law deciding what are and are not defects of title (as distinct from defects in quality) in particular situations. No case to which the court was referred addressed the absence of a contract of insurance.

...Legal and practical enjoyment of that land was in no way undermined by the non-existence of a contract of insurance underpinning whatever rights the purchaser might wish to assert against the original builder under the statutory warranties.

...Not even the quality of the subject property is affected by the absence of insurance. All that has happened is that the vendor (not having the benefit of insurance) did not promise to include that benefit as part of the contract subject matter.

...I have concluded that there was no such defect when the Act and the contract are analysed. ...insurance cover would have been an advantage to the purchaser to the extent that any of the statutory warranties were breached within the seven year timeframe, but this was insufficient to give it a right to insist that the vendor obtain such cover.
The appeal should be dismissed with costs

The insurance provisions of the Home Building Act are extremely important in all sales or purchases of residential premises less than 7 years old. Failure to recognise and deal with the insurance issue might leave a client without insurance if building problems arise that could have been the subject of a claim.