

## Glossary

This is not complete and the information in it is no substitute for advice from a qualified person.

### Agent

This word is used here to refer to the real estate agent acting for the vendor. The word has a wider legal meaning which can make a party's conveyancer or partner (business or domestic) an agent also.

### Completion

Completion and settlement both refer to the moment when the purchaser hands over the rest of the purchase price and receives in return the certificate of title and a document called a transfer by which the vendor signs the property over to the purchaser.

The property is not signed over in the contract itself. One of the things the contracts says is that the vendor agrees to sign the property over at a later date (the date of completion) in return for the balance of the purchase price.

Completion usually occurs at the office of the vendor's conveyancer or the vendor's bank or building society if it holds a mortgage over the property.

The balance of the purchase price must be in the form of one or more "settlement cheques". These are defined in the contract to include only the safest types of cheque - a bank cheque for example.

The amount to be paid is about 90% of the purchase price if the deposit was 10%. It is not exactly 90% because the amount is adjusted to take account

of a number of things such as

- ♦ vendor and purchaser each paying his or her fair share of rates and water usage.
- ♦ the vendor compensating the purchaser if the purchaser will incur the cost of registering a discharge of the vendor's mortgage.

After completion, the transfer and the certificate of title are registered at Land and Property Information (LPI) which is still better known as the LTO or Land Titles Office. Registration is the point when the purchaser becomes the owner of the property. A new Certificate of Title is printed and given to the purchaser. It shows him as now being the registered proprietor.

### Community title

Community title enables owners to share common property as with strata title but it also creates individual allotments. It has been possible to create a community subdivision only since 1989.

It has possibilities for retirement villages, tourist resorts or multiple occupancy of rural land.

### Contract for Sale of Land

The contract usually used is a printed contract of about 10 pages. The Law Society of NSW and the Real Estate Institute of NSW own the copyright in it. It is revised every few years to reflect changes in the law and practice.

Most of the contract can be changed to suit the circumstances or the wishes of the parties and changes are common.

The selling agent (and any private vendor) must have a copy of the proposed contract available for inspection if a residential property is being sold.

### Cooling-off period

This is an anti-gazumping and consumer protection rule. It enables a purchaser to make a sale of residential land binding on the vendor while retaining the option, for a short time, of being able to get out of the contract himself at a relatively small cost.

The rule applies only to residential land except residential land sold at auction or shortly after it has been passed in at auction. It does not apply if there is a section 66W certificate attached to the copy of the contract signed by the purchaser. This certificate is signed by an independent solicitor or barrister who has told the purchaser that he, the purchaser, is thereby losing the right to cancel the contract.

### Deposit

This is usually 10% of the purchase price but the parties can negotiate about this. After contracts have been exchanged, the deposit will be held in a bank account by the "stakeholder" who is usually the vendor's [agent](#). There are strict regulations governing operations on such bank accounts.

### Deposit, release of

Although the stakeholder is usually the vendor's [agent](#), he cannot deal with the deposit without both the vendor and purchaser authorising him to do

so. At [completion](#), the purchaser's conveyancer will give the stakeholder written authority to deal with the deposit. The stakeholder, if the vendor's agent, will usually have the vendor's authority to deduct his commission from the deposit.

### Easement

An easement is a right that the owner of one block of land has over another block of land. Examples are

- ♦ a right to gain access to my land over your land
- ♦ a right to drain rainwater from my land through your land
- ♦ a right to leave an encroaching wall of my home on your land

Developers often create easements when their subdivisions are registered. Individual owners can also agree about such matters. They can agree in any way they like, such as a handshake or a simple hand-written document, but the agreement only becomes enforceable and an easement if a number of formalities are followed.

Only easements are binding on subsequent owners of the lots. A simple agreement between current owners does not bind later owners.

For example Annette and Xavier own adjoining homes in Mayfield. They both want access to their backyards for their cars but there is not enough room down the side for this. However, if they pulled down the dividing fence the combined space between their homes is wide enough for a car. They agree to do this. Each builds a garage in their backyard and drives her car down the shared space.

Annette's home is later sold to Barbara and then to Charlene. Xavier's home is sold to Yvonne and later to Zara. If Annette and Xavier go through the necessary formalities to create easements in favour of each other over their own strip of land, then the subsequent owners will also have the same rights.

### Exchange

This refers to the point when the result of the negotiations becomes legally binding on the vendor and, subject to cooling-off rights, on the purchaser. In a typical case, the parties negotiate a sale through the vendor's agent. The purchaser will pay a "holding deposit" to the agent who stops marketing the property. He notifies the vendor's conveyancer of the details. The vendor's conveyancer will insert the details in two copies of the contract in his file and send one copy to the purchaser's conveyancer. The parties sign the copy held by their respective conveyancers who swap them when the parties wish to commit themselves legally.

### Fixtures

A contract for sale of land is just that - a sale of the land. If there is a house on the land, should there be separate contract relating to the house? The answer is in the negative because a simplified statement of the law of fixtures says that anything intended to be permanently attached to the land becomes part of the land. Thus a change in ownership of the land automatically means a change of ownership of anything permanently attached to it.

It is not always easy to say if something is a fixture or not.

Examples that could cause difficulty are garden sheds or small aboveground pools. The standard contract overcomes these difficulties by giving the parties the opportunity to specify what improvements such as a dwelling, garage or carport are included in the sale. Similarly they can specify what fixtures such as light fittings, air conditioners or dishwashers or included.

The parties can also specify that something, that would normally be considered a fixture, is not to be included in the sale and can be taken by the vendor. This might be a curtain that matches a bed cover or a lounge.

### Gazumping

Gazumping refers to a vendor going back on his non-binding agreement to sell land to a purchaser.

When first negotiated, an agreement for sale of residential land will almost always be unenforceable until a later time when contracts are exchanged - see [exchange](#).

Until that occurs, both vendor & purchaser face the risk that the other will change his or her mind about going through with the sale. A vendor may be tempted by a better offer made to him before contracts are exchanged.

The vendor may sell to the new purchaser or use the new offer to extract a better price from the original purchaser. This is gazumping.

Between the time when a sale is negotiated and the time it becomes binding, a purchaser may spend a lot of money and time on inspections and a loan approval only to be pipped at the post by another purchaser.

This makes prospective purchasers very angry, particularly if it has happened to them more than once.

The NSW government has acted on complaints and enacted various anti-gazumping measures over the years. The current laws have been in place for some time and include

- ◆ vendor disclosure rules
- ◆ vendor warranties
- ◆ a cooling off period

Their purpose is to make it less risky for a purchaser to exchange contracts quickly.

### Identifier

This is the crucial way of identifying land under Torrens title as it operates in NSW. 123/456789 is an identifier. It means that the land is lot 123 in deposited plan 456789.

Deposited plans, with some exceptions, have been prepared by surveyors in accordance with LTO rules and have been checked by the LTO before they are registered. They therefore accurately set out the location and dimensions of each lot in the plan.

### Insurance

Your mortgagee will insist that you take out insurance on your new home and that its name is also on the policy before it will give you any of the loan

money. This means you will have to fix this up at least a week before completion.

What if the house is burnt down after contracts have been exchanged but before completion has occurred? Whose loss will it be? You may think it is common sense that the vendor bears the loss up to completion and the purchaser after that. That is in fact the situation but only in respect of residential properties and only since 1986 when the government changed the law. Before then the risk passed to the purchaser when contracts were exchanged.

If you claim on your policy for damage sustained whilst the property is still mortgaged to a bank or building society, you may be surprised to find that the mortgagee has the right to deal with the insurer. It may also choose to have the loan paid out or reduced rather than have repairs carried out with the money to come from the insurance company. They have this right under many mortgages.

### Mortgage

A mortgage is a document that enables a lender (the mortgagee) to sell a borrower's land if the borrower (the mortgagor) defaults under the loan. The mortgagee thereby gets his money back. The lender (mortgagee) holds the title deeds.

### Notice to complete

This is a notice sent to a party who has not completed by the stipulated date in the contract.

The contract for sale of land will stipulate a time for completion but this is not usually what lawyers call an essential term of the contract. This means, that if the purchaser, for

example, does not complete by the stipulated time, the vendor cannot immediately cancel the contract. He might, however, be entitled to interest, because of the delay, if the contract allows for this.

If the delays look like continuing, he serves a notice to complete on the other party. By this means, the party who is not at fault, stipulates another time for completion and makes "time of the essence". If the party at fault has not completed by the new time then there may be drastic consequences for him. If he is the purchaser, this may mean losing his deposit; that is, \$40,000.00 deposit on a \$400,000.00 purchase.

### Old System

This refers to the method of proving ownership of land that existed before the Torrens system was devised.

Under this system a vendor needed to keep documents showing many years of transactions relating to a property. During this time the property may have been sold, mortgaged or inherited on many occasions. The purchaser's conveyancer may need to look at all of them to be sure that his client is getting what he has agreed to buy. This means looking at evidence of the ownership, location and dimensions of the land. When sold, the new purchaser's conveyancer will need to do the same thing.

### Restrictive covenants

You will often find that all lots in a subdivision are affected by restrictive covenants. They are usually expressed in negative terms such as

- ◆ no house erected shall have an area of less than 100 sq metres
- ◆ the roof cannot be made of any material except colorbond or tiles
- ◆ a truck of more than 2 tonnes may not be parked on the property
- ◆ an existing home cannot be moved onto the property

Developers do this as a way of guaranteeing a certain standard of home or type of use of the land. Long after the developer has sold every block and disappeared, the restrictive covenants will still be binding on the original purchasers and those who come after them. This means that a homeowner may be able to take action against his new neighbour who starts parking and working on his semi-trailer on his block.

You might think that it is the job of council to decide about such matters. Should the council have to take account of these restrictive covenants if someone applies to build a home or operate a truck from a property?

In the past, councils usually decided that it was not up to them to police private restrictive covenants. They might therefore consent to development that infringed a restrictive covenant. The council might, for instance, give consent to a hardiplank home that is prohibited by a restrictive covenant. Despite the consent, the owner still faces the risk that a

neighbour may try to enforce the covenant.

Wouldn't it be better if council approval cancelled the effect of a restrictive covenant?

The government thought so. It amended the Environmental Planning & Assessment Act. If a local council puts the necessary clause in its local environmental plan, a consent will nullify a private covenant to the extent necessary to give effect to the consent. Clause 18 in Newcastle Local Environmental Plan 2003 is such a clause.

### Settlement - see [completion](#)

### Strata title

This typically refers to the system of registering title to home units in multi-storey buildings and defining their area. However, the units need not be home units. They can be used for commercial or any other purpose. They may also be in a single storey building.

The essential characteristic of strata title units is that they represent the right to occupy air space defined by the interior surface of the walls of the unit. A type of company called the Owners Corporation owns the structure itself. The owners of units pay levies to the Owners Corporation so that it can insure and maintain the structure and "common property"

### Trespass

Following are brief facts in three cases involving allegations of trespass.

- ◆ A landowner charged a fee for members of the public to enter a cave from his land to look at the

spectacular formations inside. The cave ran under a neighbour's land. The neighbour said the members of the public were trespassing on his land.

- ◆ An advertising sign on top of a high building partly overhung a much lower building on adjoining land. The owner of the lower building said the overhanging sign amounted to a trespass to his land.
- ◆ A company was in the business of flying over country manors in England and taking photos of them. They would then offer to sell the photos to the owners. One owner sued the company claiming that flying over his land was trespassing.

The original legal theory was that ownership extended up to the heavens and down to the centre of the earth. This theory causes problems in the age of planes and satellites. What effect would it have on underground mining? Land granted by the government in former coal mining areas like Kurri Kurri and Cessnock was specifically to a depth of 50 feet only.

The theory now developed by the courts is that an owner may take action against intrusions only to the areas over or under his land that he might reasonably use.

Is the meter reader or door-to-door salesperson a trespasser? The courts say that he has implied permission to enter the land to read a meter or to state his purpose to the owner. Once the meter has been read he must leave. The salesman must leave if it is made clear he is not wanted on the land.

Nobody who outstays his or her welcome seems to get sued for trespass. The domestic violence provisions of the Crimes Act often deal with the problem or the police charge a trespasser under the Inclosed Lands Protection Act.

The spelling of "Inclosed" on the signs around schools probably upsets the teachers but it was the spelling used when the Act was passed in 1901.

### Torrens Title

This was a system of registering ownership of land which was devised by Sir Robert Torrens who was the first premier of South Australia. It was introduced to NSW when the Real Property Act was passed by parliament so it is correct to refer to it as Real Property Act title. Most land in the eastern half of NSW, particularly in the towns and cities, is now Torrens title land.

It looks like the system of registering motor vehicles in that a government authority is notified if land or a motor vehicle changes hands. But registering a transfer of land has different legal consequences from registering a motor vehicle. The Torrens system is mostly concerned about who owns land. Vehicle registration is mostly concerned about who controls the use of a motor vehicle.

The conveyancer acting for the purchaser of Torrens title land does not need to look at all the old documents. All he needs to do is check the current record of ownership at the LTO. This tells him who the

owner is and the relevant deposited plan includes correct surveying information as to the location and dimensions of the land.

### Vendor disclosure

A regulation was made which requires a vendor to have a contract ready before a residential property is put on the market. A copy of the contract must be available for a prospective purchaser to look at.

The contract must contain certain documents that include

- ◆ a zoning certificate
- ◆ a sewer location diagram
- ◆ a plan of the lot
- ◆ a copy of the title deed and any easements or covenants

### Vendor warranties

The average person understands a warranty as a retailer's or manufacturer's promise to repair or replace a defective product. The word "warranty" has a more general meaning to lawyers. To a lawyer, warranties are statements in a contract that a party says are true or are promises that he will do or not do something.

Examples are:-

- ◆ "This car has always been serviced in accordance with the manual."
- ◆ "I will supply you 50,000 widgets at this price."
- ◆ "I will not compete with your business for three years."

A lawyer might also describe the same statements as a condition or a covenant depending on the circumstances. Describing a

statement as a warranty or a condition reflects the lawyer's opinion as to how important the statement or promise was to the parties at the time. This has important consequences if the statement is untrue or the promise is broken.

This way of classifying statements and promises in a contract is usually made by lawyers after a contract has been broken because many contracts are made without the parties clearly expressing at the time how important any particular statement is to them.

In the context of the sale of land, a warranty could be any of the following:-

- ◆ The vendor does not know of any proposed road widening which will effect the property
- ◆ The vendor is not in dispute with any neighbour about the location of the boundary between them
- ◆ The vendor has not received any notices from the council requiring him to do anything to the property

The NSW Government thought that it was appropriate that a number of such warranties should be in every contract for sale of land so it passed the necessary laws to make this so. The result is that these apply whatever the parties say about those matters in their contract. In other words, the vendor cannot "contract out" of the consequences of these warranties.

What are these warranties?

They are statements, said to be made by every vendor, about the land he is selling. They are not written down in the contract or stated verbally but apply because the NSW parliament says they do.

The warranties include statements that

- ◆ the zoning certificate in the contract correctly sets out certain matters in relation to the land - particularly the zoning
- ◆ the land does not include a sewer main unless it is disclosed in the contract.
- ◆ the land is not adversely affected by road or rail works, acquisition for school purposes, electricity transmission lines or pipelines, heritage orders or pollution unless it is disclosed in the contract.
- ◆ there are no claims or disputes regarding the boundaries
- ◆ the land is not affected by provisions of the Stock Diseases Act and many other acts of parliament particularly relevant to rural land.

What is important about this? If a purchaser finds out that any of the things said to be true are not true he has the option of getting out of the contract.

It speeds up the exchange of contracts because a cautious purchaser will not feel the need to find out about these things before exchanging contracts.