

Discussion Paper Review of Conveyancing (Sale of Land) Regulation 2005

March 2010

All submissions due by 5pm, Monday, 12 April 2010



Land and Property
Management Authority



How to make a submission

All interested persons are invited to make a written submission on this discussion paper.

Please send all submissions to:

kye.tran@lpma.nsw.gov.au.

Otherwise, please send any paper submissions to:

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All submissions must be received by 5pm, Monday, 12 April 2010.

All submissions may be made publicly available.

Should you wish to have your personal details omitted in the course of publication, please clearly indicate this in your submission.

Introduction

Section 202 of the *Conveyancing Act 1919* ('the Act') contains a general power to make regulations. *The Conveyancing (Sale of Land) Regulation 2005* was made under the general power and commenced on 1 September 2005 after a review of the regulation pursuant to the Subordinate Legislation Act 1989. The 2005 regulation replaced the earlier regulation, with some amendments.

The regulation requires that a vendor disclose, through annexure to the contract, information about title, zoning, sewerage, easements and covenants that affect the land. The regulation also deals with purchasers remedies, cooling off rights and options for the purchase of residential property.

The Land and Property Management Authority (LPMA) is responsible for the administration of the act and the regulation. Consistent with previous reviews of the regulation, a working group has been established to examine current conveyancing issues and to recommend any amendments to the conveyancing legislation deemed necessary. The working group consists of representatives from the LPMA, the Office of Fair Trading, Law Society of NSW, Australian Institute of Conveyancers NSW Division Limited and the Real Estate Institute of NSW.

This paper discusses the issues that have been raised in relation to the Regulation's implementation.

The Minister for Lands and the LPMA encourage any person who has an interest in the regulation or matters directly affecting the regulation to put forward their views and raise any matters in the regulation that ought to be considered for regulatory change.

Purpose of review

As the current regulation will be automatically repealed on 1 September 2010 pursuant to section 10(2) of the *Subordinate Legislation Act 1989*, a remake of the regulation is intended to take effect upon the expiry of the current regulation.

The purpose of this review is to assess the current practical and legislative aspects of conveyancing, and to investigate and make recommendations for any changes with respect to the regulation that will simplify and speed up the conveyancing process in NSW.

In conjunction with the Parliamentary Counsel's Office, the review will also seek to undertake some changes to the format of the Regulation. Such changes would include updating citation to Acts and enhancing overall readability. The draft Regulation will be available for public comment within the coming months as an attachment to the Regulatory Impact Statement of this Regulation.

The current review of the regulation is intended to maintain the conveyancing objective of balancing what a vendor must disclose with what a buyer can reasonably confirm through their own enquiries.

3. Proposals for reform

Vendor disclosure and warranty

Section 52A (2) (a) of the *Conveyancing Act 1919* requires the vendor under a contract for the sale of land to attach to the contract such documents as may be prescribed. The documents that are required include a copy of the title for the land, a copy of the plan for the land, any documents creating easements, restrictive or positive covenants, a sewerage diagram where available and a section 149 *Environmental Planning and Assessment Act 1979* certificate. Additional documents are required for land in strata or community schemes relating to common or association property as the case may be, as well as the management provisions for the scheme.

Consistent with reviews conducted of the same regulation in the past, suggestions have been received that the following should be made additional compulsory annexures to the contract for sale of land:

- (a) Building Inspection Reports
- (b) Pest Inspection Reports
- (c) Asbestos Inspection Reports
- (d) Residential Building Mandatory Disclosure
- (e) Home Warranty Insurance Certificate for Owner Builders
- (f) Swimming Pool Barrier Compliance Statement or Certificate
- (g) Survey Report

Each of these items are discussed below.

A. Building Inspection Reports

A building inspection report is one form of pre-purchase report a purchaser can commission before the purchase of a property and is a written account of the condition of a property. It will identify any significant building defects or problems such as rising damp, movement in the walls (cracking), safety hazards or a faulty roof to name a few. It is usually carried out before exchange of sale contracts to identify problems with the property which, if left unchecked, could prove costly to repair.

However, a standard building inspection report is generally a visual inspection only and may not identify major structural defects or other hidden problems. If a buyer has concerns about specific problems, he/she might consider obtaining an additional assessment of the property from a suitable specialist. Further issues may arise when a vendor commissions several reports as a vendor's objective may be different to a purchaser. To obtain a better sale price a vendor may be tempted to shop around for a report that shows the property in the most favourable light. To ensure independence of the report, purchasers may wish to obtain their own reports. If implemented, the proposal may not result in cost savings for the purchaser, as the purchaser will be required to reimburse the vendor for the cost of the reports in addition to any independent reports they have commissioned separately. There are also issues with regard to the length of time for which a report would remain current enough to be considered reliable.

Previously, building inspection reports were rejected as a compulsory annexure in past reviews of this regulation as there were no licensing, minimum educational requirements or compulsory indemnity insurance requirements for persons carrying out inspections and issuing reports. In January 2004, amendments to the *Home Building Act 1989* made it mandatory for building inspectors to be licensed, a practice that was later legislatively abolished

pursuant to a review conducted by the Better Regulation Office in 2009 into the Licensing of Selected Occupations. Thus, persons are currently not required to be licensed to conduct pre-purchase building and pest inspection reports.

B. Pest Inspection Reports

A pest inspection report is given by a person who physically inspects a property and reports on the presence or absence of various pests, with wood destroying pests such as termites being of particular concern. While a building inspection report should identify any visual damage that may have been caused by insect infestation, a pest report is more focused. It should provide a visual inspection of the property to identify pest related risk and will highlight past, present and possible future insect activity.

It is understood that, while there are licensing, minimum educational requirements and compulsory indemnity insurance requirements for pest controllers (that is, persons who actually treat for pests), these are not required for persons who only carry out inspections and issue reports.

It would, however, be possible to require that a report can only be given by a licensed controller having specific experience or training.

The same issues regarding currency of the report arise with pest reports as with building inspection reports. It is acknowledged that the difficulty with prescribing time limitations for these pre purchase reports, is that any time limit prescribed by regulation would be arbitrary, and even a report relied upon well within the prescribed time can still be unreliable, given the rapid nature of insect infestation, which may cause a false sense of security for a purchaser. Conversely, a report may still be correct after a time in which a limit is prescribed. In addition, a purchaser or incoming mortgagee may insist on procuring a fresh report thereby defeating the cost saving rationale.

Furthermore, in NSW, a purchaser seeking to rely on the representations made in a pre purchase report commissioned by the vendor may experience difficulty in recovering damages for any loss caused by any error

or omission in the report. This is because the vendor and the report author are the parties to the contract under which the report is prepared. The doctrine of privity of contract prevents the purchaser from directly relying on the contract. In the ACT, legislation gives the purchaser a direct right to sue the report author in circumstances where loss has been suffered as a result of any materially false or misleading statement or content in a report. If in the future, a vendor is required to provide building or pest inspection reports to a purchaser in NSW, a similar provision of this kind will have to be adopted to overcome the issues that arise in such a case.

Issues for discussion

- Should vendors be required to supply building, and/or pest reports to contracts for the sale of land?
- Would purchasers feel more comfortable obtaining their own reports?
- Should a purchaser who relies on the information supplied in the report be able to initiate proceedings against a report author when the content is misleading, negligent or otherwise incorrect?
- How can the statutory regime in NSW operate to prevent vendors from supplying favourable reports to potential purchasers? What means should be undertaken to ensure compliance with any rules prescribed which are associated with the regime?
- Should the validity of reports be time limited? For example, 3 months after the preparation of the report? Consideration should be given to a scenario where a fault arises after a report is prepared but within the 3 month period, for both pest and building issues.
- Will purchasers be advised to commission their own report, either before exchange of contracts or after exchange to 'test the warranties'?

C. 'Asbestos Inspection' Reports

It has been suggested that a certificate of inspection regarding the presence of asbestos be made a compulsory annexure to a contract for the sale of land.

It is not clear who would be qualified to give such a certificate, or what the certificate should contain. In the ACT, an asbestos report/advice is also a mandatory document to be attached to a contract for the sale of land. An asbestos report identifies the existence of any asbestos on the property and gives advice as to how the asbestos should be managed.

Another option would be to have the presence of asbestos included as standard content in a building report.

Issues for discussion

- Should an asbestos inspection report be made a mandatory document to be annexed to a contract for the sale of land?
- If so, what form should the 'asbestos inspection' report take?

D. Residential Building Mandatory Disclosure¹

In July 2009, the Council of Australian Governments (COAG) published a National Strategy for Energy Efficiency. One proposed measure of the national strategy would require owners and landlords to disclose the energy efficiency, greenhouse impact and water efficiency of residential buildings (herein referred to as Residential Building Mandatory Disclosure), at the time of sale or lease. In practice, the proposal would require the vendor be in a position to disclose the property's energy efficiency rating before the property is marketed for sale or lease, using a prescribed home energy rating system. It has been suggested that the strategy be implemented by the vendor supplying to a purchaser,

¹This information is being supplied on behalf of the NSW Department of Environment, Climate Change and Water.

the relevant rating in the form of a single Certificate, issued by a suitably qualified professional. It is envisioned that the Certificate will be attached to the contract for sale (as a prescribed document) or contract for lease. At the time of printing, the Residential Building Mandatory Disclosure is intended to commence in May 2011. More information on the nature and scope of the proposed Residential Building Mandatory Disclosure will be available within the coming months through the Australian Government Department of Climate Change and Energy Efficiency by release of a Regulatory Impact Statement (RIS).

The RIS will allow time for community consultation and instructions on how to comment or provide submissions on the national strategy will be made available in the upcoming RIS.

Upon the legislative commencement of Residential Building Mandatory Disclosure, it is considered necessary to attach the 'Certificate' to a contract for the sale of land as a prescribed document in the Regulation to ensure consistency in conveyancing practice.

E. Home Warranty Insurance Certificate for Owner Builders

In NSW, private individuals can undertake residential building work by application for a permit issued by the Office of Fair Trading. Permit issue is subject to certain conditions, such as obtaining home warranty insurance if the value of work exceeds the amount of \$12,000.

Section 95(2) of the *Home Building Act 1989* prescribes that an owner builder cannot enter into a contract for the sale of land unless the owner builder, or licensed builder on behalf of the owner, supplies a certificate of insurance as an attachment to the contract for sale. Section 95(4) allows the sale to be voided in certain conditions before the completion of the contract for sale if the certificate of insurance is not annexed to the contract.

Currently, there is no reference to the requirement to attach a certificate of insurance in circumstances described above in the *Conveyancing (Sale of Land) Regulation 2005*, although it appears in the List of Documents in the Standard Contract for Sale of Land, 2005 Edition. It is considered necessary to include the requirement to attach a certificate of insurance under the *Home Building Act 1989* into the proposed *Conveyancing (Sale of Land) Regulation 2010* to enhance consistency and to provide linkages for conveyancing practice.

F. Swimming Pool Barrier Compliance Statement or Certificate ²

The Minister for Local Government has responsibility for the administration of the *Swimming Pools Act 1992* and its Regulation in NSW. This legislation provides for private ('backyard') swimming pools in NSW to be surrounded by child-resistant barriers to prevent unsupervised access by children.

A comprehensive review of the *Swimming Pools Act 1992* was recently undertaken by the Department of Local Government to identify any appropriate amendments to enhance the safety of young children in the vicinity of private pools. Recent amendments to the act were made in 2009 to require a high standard four-sided, child-resistant pool barrier to surround all new pools in NSW.

The Act's intention is for all pools in NSW to be isolated from the house, adjoining properties and public spaces at all times, ultimately reducing the risk of toddlers drowning in backyard pools. The Department of Local Government is currently considering further amendments to require barriers on existing pools to be upgraded to the latest standard at either point of sale and/or point of time.

Issues for discussion

- Should a written confirmation of compliance under the *Swimming Pools Act 1992* for barriers on existing swimming pools be attached to the Contract of Sale of Land to be made applicable for properties with a swimming pool?

² This information is being sought on behalf of the Division of Local Government, Department of Premier and Cabinet.

- If so, what form would be the most appropriate to attach? A swimming pool barrier compliance statement by the vendor (not requiring inspection by the local council), or a Compliance Certificate issued by the relevant Council (requiring inspection by council)?

G. Survey Report

Another inquiry often made during the conveyancing process relates to survey. An identification survey can be prepared by a surveyor to ensure that the boundaries of the property being purchased correspond to the dimensions shown on the relevant plan. The survey will also disclose whether there are any encroachments from or onto the subject land and will confirm whether the buildings on the land being purchased comply with the relevant council ordinances regarding setback from the street, distances from boundaries and compliance with the terms of any restrictions on use of land.

Minor irregularities disclosed in a survey report, such as fences that deviate from the boundaries by a few millimetres are not generally matters of such concern to a potential purchaser that would cause a sale to fall through. However, more serious irregularities such as an encroachment by or upon the property or non-compliance with council ordinances are matters which would concern a potential purchaser or mortgagee and may amount to a defect in title. The identification survey would be useful in this situation, and will inform the purchaser of the severity of any compliance issues relating to the property that require rectification as the incoming owners may be liable for any identified defects.

The cost of the survey is an issue of concern. The typical identification survey costs range from \$500 to \$1000 and if added as a prescribed document it may be borne by the vendor. In assessing whether a survey should be made a prescribed document, a secondary issue arises as to who should be liable to pay for the cost of the survey. It may be argued that the cost of the survey shouldn't fall on the purchaser given the warranty under the Regulation which prescribes that issues such as an encroachment amount to an adverse affectation and alone is enough for a purchaser to rescind the contract up until settlement.

Issues for discussion

- Should an identification survey be included as a prescribed document?
- In light of the Regulations prescribed warranties, if a survey is required to be attached to a contract for sale of land, should the vendor or the purchaser be liable for the costs associated with conducting the survey?

Warranty in contract

The Regulation prescribes a number of warranties that are deemed to be included in a contract for the sale of land. As a result the purchaser is in the position of being able to exchange contracts without having to go to detailed areas of enquiry to speed up the conveyancing process

Adverse Affectations

Under a Contract for Sale of Land, an adverse affectation is taken to be disclosed in the contract if the documents listed in Part 3 of the regulation are attached to the contract.

Clauses 2 of Part 1 and Part 2 provide specific descriptions of what is deemed to be an 'adverse affectation' for the purposes of the contract of sale of land.

Disclosure of Acquisition

There are currently three clauses in the Regulation that require the acquisition of a whole, or any part of land, to be an adverse affectation when a proposal is made by:

1. The Minister for Education and Training
2. New South Wales Land and Housing Corporation; and
3. Minister for Energy jointly with the Minister for Water under the *Pipelines Act 1967*.

Issues for discussion

- Should these clauses be merged to widen **any** proposal or notice of intended acquisition by the State or Commonwealth?

Adverse affectations under the Soil Conservation Act 1938 and the Native Vegetation Conservation Act 1997 and section 38 of the Native Vegetation Act 2003

LPMA makes available certain search facilities for persons interested in the land to make further independent enquiry to confirm the warranties disclosed and to ascertain further information as required. The Property Information Inquiry Service (PIIS) and the Central Register of Restrictions (CRR) are the most relevant to 'test the warranties' prescribed in a contract of sale. These services have linkages to certain information held with Local Government, the Crown and Commonwealth Agencies that affect land.

The PIIS and CRR are services independent of the Torrens Titling system which provides an interested person with a simple, readily accessible and expedient means to confirm whether the vendor has properly fulfilled his/her disclosure obligations. This would assist in enabling resolution prior to settlement of any variance between the search result and the contract.

It has become apparent that not all the provisions noted in Schedule 3, Part 3 are readily available for search through the PIIS and an interested person must make independent searches. Enhancing the capability of the PIIS and CRR search facility should be further investigated to assist interested persons in confirming affectation as they affect the land with regard to adverse affectations under clauses 15 and 16 of Part 3 of the Regulations.

Issues for discussion

- What methods can be undertaken to ensure that clauses 15 and 16 of Part 3 of the Regulations can be easily accessible for vendors to warrant and purchasers to confirm through enquiries?
- Are these warranties still required?
- Are there any other affectations as a result of legislative development that should be included in this list?

Residual issues identified in this review

1. Should any of the existing compulsory annexures to the contract for the sale of land be removed or modified?
2. Should there be any changes to the existing prescribed warranties?
3. Should there be any changes to the existing implied terms and prescribed terms?
4. Should there be any changes to the existing purchasers' remedies?
5. Should NSW adopt a "vendor statement" document (like Victoria and Queensland) where the onus is on the vendor to provide written answers to questions about the state of the property and whether they are aware of certain things that may affect the property?

Invitation to comment

This brief paper has sought to identify some issues that have been raised in the interim stages of the Review.

Please refer to the start of this paper for information on how to make a submission.

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