Discussion Paper

Review of the *Conveyancing (Sale of Land) Regulation 2010* and the Conveyancing Process in New South Wales

August 2016

Submissions accepted until **5pm Friday 30 September 2016**

Forward all submissions to:

Email: ORG.Admin@lpi.nsw.gov.au

Mail: Conveyancing Review
Office of the Registrar General
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Title: Discussion Paper - Review of the *Conveyancing (Sale of Land) Regulation 2010* and the Conveyancing Process in New South Wales

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

Please send all submissions to ORG.Admin@lpi.nsw.gov.au

Alternatively, please send any paper submissions to:

Conveyancing Review

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Table of Contents

1. Introduction

Conveyancing is the process by which the legal ownership of land is transferred from one person to another. Although the transfer of property is the end goal of a conveyance, there are many matters that must be carried out before the transfer can occur. The *Conveyancing (Sale of Land) Regulation 2010* ('the Regulation') sets out the requirements of conveyancing in NSW.

The Regulation is an important piece of legislation. It facilitates the early exchange of contracts and reduces the opportunity for gazumping[1], which was a common occurrence prior to the Regulation's commencement in 1986[2]. The Government intends to remake the Regulation before it is automatically repealed on 1 September 2017[3]. The Office of the Registrar General, part of the Better Regulation division of the Department of Finance, Services and Innovation, is responsible for the administration of the Regulation and, as part of the remaking process, is conducting a review of it.

Consistent with previous reviews, a working group has been established to examine current conveyancing issues and recommend amendments. The working group consists of representatives from Land and Property Information (LPI), Fair Trading, Law Society of NSW, the Australian Institute of Conveyancers NSW Division Limited and the Real Estate Institute of NSW.

The last few years have brought new developments to the conveyancing process resulting in this review of the Regulation being postponed twice during that period. A buoyant auction market, predominantly in the Sydney metropolitan area, has reignited concerns over vendor disclosure in light of the significant costs expended on pre-contract enquiries by ultimately unsuccessful purchasers. The increasing popularity of purchasing properties off-the-plan[4] has also raised issues of disclosure, as well as the need to strengthen a purchaser's rights against the conduct of developers in the conveyancing transaction. This latter point led to the NSW Government inserting provisions into the *Conveyancing Act 1919* in November 2015 aimed at preventing developers unreasonably rescinding contracts for residential property under a sunset clause[5].

Such changes have occurred against the background of the National Electronic Conveyancing framework, which has been progressively introduced in NSW, bringing new questions of how a complete conveyancing transaction may be more efficiently conducted in an increasingly paperless society, such as through the use of electronic contracts. As the Government plans to accelerate the transition to electronic conveyancing and progressively phase out paper certificates of title in NSW[6], the need for a streamlined paperless process from the commencement of a conveyance to the ultimate completion and registration of documentation is of growing significance.

The review will assess these issues, as well as other current practical and legislative aspects of conveyancing, and make recommendations for change that will simplify and speed up the conveyancing process.

Any significant changes to the Regulation as a result of this review will be available for public comment in the form of a draft Regulation attached to the Regulatory Impact Statement, which will be made available during the first half of 2017.

The Minister for Finance, Services and Property and the Registrar General 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 that ought to be considered for regulatory change.

1. To make a higher offer for a property than someone whose offer has already been accepted by the seller and thus succeed in acquiring the property notwithstanding an earlier verbal agreement.
2. Originally called the *Conveyancing (Vendor Disclosure and Warranty) Regulation 1986*
3. Due to the operation of section 10(2) of the *Subordinate Legislation Act 1989*. The Regulation's repeal has been postponed for the last two years.
4. Off-the-plan purchases occur where a property is sold to a purchaser but, at the time contracts are exchanged, the land is yet to be subdivided or the strata building has not yet been constructed.
5. Sunset clauses in off the plan contracts generally provide that, if works are not complete and a separate title for the lot is not issued by a certain date (the sunset date), then either party may terminate the Contract.
6. See Government announcement: www.finance.nsw.gov.au/about-us/media-releases/first-step-path-paperless-conveyancing

2. Objectives of the Regulation

The objectives of the Regulation are to:

a. speed up conveyancing transactions

b. reduce the period between verbal agreement and entry into a legally binding contract

c. provide protection for purchasers who enter into a contract relying on the prescribed documents and the vendor's warranties

d. maintain the conveyancing objective of balancing what a vendor must disclose with what a purchaser can reasonably confirm through their own enquiries.

The Regulation requires that, before the land can be sold, the vendor disclose (by attaching to the contract) information about title, zoning, sewerage, easements and covenants and (where applicable) swimming pool compliance. The Regulation also prescribes certain warranties that a vendor must make in relation to the vendor's ability to transfer title to the property (which may be qualified by specific disclosure in the contract). The Regulation offers protection to the purchaser by providing a right to rescind the contract in the event the vendor has not met its disclosure obligations.

The collective effect of these provisions is that a purchaser can comfortably rely on the information provided by the vendor in the contract. Contracts can be exchanged quickly, with minimal pre-purchase investigation, reducing the incidence of gazumping.

It should be noted that the existing regime set in place by the Regulation has been operating successfully for almost 30 years. The effectiveness of the vendor disclosure regime means that most conveyancing transactions take place over a period of 4 to 6 weeks. This timeframe is generally necessary to ensure finance arrangements are in place (either new finance or a mortgage discharge), a matter which is beyond the scope of the Regulation. Though conveyancing transactions can be stressful for the parties and are often carried out under pressure, the conveyancing industry (real estate agents, lenders, solicitors and conveyancers) are well versed in the process and the majority of transactions are completed without incident.

For these reasons this paper submits that the Regulation is meeting its objectives.

Issues for discussion

Q.1 Is the Regulation achieving its objectives?

Q.2 If not, why not: what practice issues have you encountered that demonstrate that the Regulation is not meeting its objectives?

3. Vendor disclosure

3.1 Background to the Vendor Disclosure Regime

In land transactions, there is generally no fiduciary relationship between the vendor and purchaser; hence the phrase 'caveat emptor', a Latin term meaning 'let the buyer beware'. Historically, this meant that a buyer was fully responsible for investigating a property to ensure the vendor was able to transfer title to it in accordance with the contract, and to ensure that the property was suitable for the purchaser's intended use. Such investigations were often lengthy and hindered by the lack of information available to a prospective purchaser.

To hasten the process and to reduce the opportunity for gazumping, the Regulation introduced a vendor disclosure regime. Recognising that there are certain matters relating to the title to the property and the use to which the property may be put (such as planning restrictions) which are within the vendor's knowledge, or readily available to a vendor upon application, the Regulation requires the vendor to provide certain documents and make certain warranties in relation to such matters in the contract. This ensures the purchaser is made aware of 'latent' defects in title, which are defects a purchaser would not reasonably be able to discover upon a careful inspection of the property.

However, caveat emptor has not been completely eroded by the Regulation, as a vendor is not presently obliged to disclose issues which would be discoverable upon a reasonable inspection of the property. These are 'patent' defects, and traditionally relate to issues of quality or the condition of the property (such as the presence of termites).

Section 52A(2)(a) of the *Conveyancing Act 1919* requires the vendor to attach to the contract for the sale of land the 'prescribed documents' listed in Schedule 1 to the Regulation. There are currently 16 classes of prescribed documents, depending on the type of property being sold.

The prescribed documents address five key issues:

- Title – the computer folio for the land is to be attached plus all recorded easements, restrictions and other relevant documents, such as a management statement or by-laws applying to strata title property
- Zoning – a section 149 certificate from council
- Sewerage – a sewerage location diagram from the water authority
- Boundaries – a copy of the registered plan
- Swimming Pools – compliance with pool safety barrier requirements.

These documents assist purchasers to ensure the land is suitable for their intended use, that it is appropriately zoned for the present use of the property and whether any planning restrictions exist, and that the property is serviced (or not serviced) by a water authority.

Section 52A(2)(b) of the *Conveyancing Act 1919* deems that the vendor has included in the contract for the sale of land terms conditions and warranties as prescribed by the Regulation. For instance, the vendor warrants (unless disclosed in the contract) that the property is not subject to an adverse affectation such as a proposal for road widening by the Roads and Maritime Services.

As a result, a purchaser may exchange contracts with minimal pre-purchase investigation. Whilst patent defects remain the responsibility of a purchaser, the need for lengthy investigations of title has been removed and a purchaser is able to rely on the vendor's disclosures and warranties. Searches and enquiries conducted after the contract is entered into may 'test' the vendor's warranties, with the Regulation providing the purchaser with rights to rescind the contract in circumstances where the vendor has not met his duty of disclosure.

3.2 Proposals for Reform

Any proposed change to the prescribed documents or warranties must be assessed against the objectives of the Regulation and, given the consequences of failing to comply with the disclosure requirements, proposals to vary the existing regime should be treated with caution.

Other matters to be considered are:

- whether a prospective purchaser is able to make an enquiry to confirm the document's details (for accuracy)
- whether it can be accessed by third parties
- maintain the balance between the vendor's disclosure and the purchaser's role in undertaking their own due diligence
- whether the disclosure relates to the vendor's ability to transfer title as promised under the contract
- whether a document is of such importance that its inaccuracy or lack of disclosure would cause an ordinary sale to fall through
- cost of compliance - cost savings to the purchaser is equally as important as it is to the vendor.

3.2.1 Prescribed documents

It has been suggested that the following documents should be made additional compulsory attachments to the contract for sale of land:

A. Pest and Building Inspection Reports

B. Strata Record inspection Report

C. Sewerage Location diagram

Each document is discussed below.

A. Pest and Building Inspection Reports

Knowing as much as possible about the condition of a property prior to purchase will assist a buyer in determining the price he or she is willing to pay for the property and helps avoid unexpected problems and extra costs relating to the property in the future. A way in which a prudent purchaser can find out such information is by obtaining pre-purchase property inspection reports.

Pre-purchase reports for the purposes of this Discussion Paper are a building inspection report, which is a written account of the condition of the property that can be seen from a visual inspection at the time the inspection was carried out; and a timber pest inspection report which is a report by a person who physically inspects a property to look for the presence of, or indications of current or past activity of timber pests such as wood-boring insects or subterranean termites. These reports are usually obtained together and are commonly known as 'pest and building reports'.

A statutory 5 business day cooling off period applies to contracts for the sale of residential property other than those exchanged at auction[7], although a purchaser may elect to waive his or her cooling off rights. Frequently, a purchaser will exchange contracts to secure the purchase and then utilise the five day period to obtain and review pre-purchase inspection reports (and deal with other matters such as finance approval). A purchaser can elect to withdraw from the contract at any time before the expiration of the cooling off period and for any reason (but, in doing so, forfeits 0.25% of the purchase price).

However, when a property is sold at auction there is no cooling off period. A prospective purchaser who wishes to bid at auction must ensure all enquiries have been carried out prior to the auction date as, if the successful, the purchaser is bound to proceed. Circumstances arise where multiple prospective purchasers obtain their own pest and building reports for the same property, and frequently a purchaser will incur the expense of the reports but not be the successful buyer.

7. Or on the day of auction where the property was passed in – see section 66T of the *Conveyancing Act 1919*

Obtaining pre-purchase reports can be very costly and time consuming, particularly if a prospective purchaser is interested in a number of properties. These reports can cost anywhere between $250 and $1,000 per property, with the costs varying according to the type of inspection report requested.

For some time there have been calls, particularly by those prospective buyers who have been unsuccessful at several auctions, to make pre-purchase reports a prescribed document – that is, a mandatory document that must be attached to the contract by the vendor before the property can be sold. The rationale is that there would not need to be multiple reports prepared for the one property, and purchasers would not be spending money on reports for properties they did not ultimately buy.

Though the proposal to make pre-purchase reports a prescribed document would alleviate the cost to a purchaser, the benefits to a purchaser quickly diminish when assessed against the reality of the pre-purchase report market.

The potential pitfall with the vendor obtaining the pre-purchase reports is that it could create a conflict of interest in which the vendor 'shops around' for a report that best suits them. A prudent purchaser would be advised in any event to obtain his or her own report, independent from that which is supplied by the vendor. This does not resolve the issue of reducing the costs to a purchaser or the need for multiple reports. Indeed, dispute over conflicting reports may arise which could result in litigation.

Often vendors elect to provide a pre-purchase report for the benefit of potential purchasers as a positive marketing tool. However, as noted above, there are issues with a purchaser relying on such a report commissioned by the vendor. Again, a prudent purchaser may wish to obtain his or her own independent report. Also, where a report has been commissioned by the vendor, a purchaser may have difficulty taking action against the Inspector who prepared the report in circumstances where the report is incorrect[8]. Even where the report has been prepared to market the property, often liability is limited considerably in the terms of the document.

Also, consider the proposal as it operates in the Australian Capital Territory. There the vendor is responsible for obtaining pre-purchase reports that can be used by all potential purchasers. The purchaser has 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[9]. However, anecdotal evidence suggests that it is standard practice for purchasers to obtain their own pre-purchase reports. In addition, if the prospective purchaser becomes the successful buyer, they are required to reimburse the vendor for the whole cost of the mandatory report[10].

Another difficulty relates to the standard of the report and those who prepare it. In NSW, the provision of pest and building reports is not regulated in that there is no licensing, minimum educational requirements or compulsory indemnity insurance requirements for inspectors[11], which impacts on the reliability of such a report.

It is also important to recognise that a report relating to the condition of a property is necessarily a 'point in time' report, and would only remain relevant for a period of time. If a property proves difficult to sell, the vendor may need to obtain fresh pre-purchase reports during the sales campaign, adding additional cost to the process. In the case of pest reports, a pest infestation can occur very quickly and as a consequence a report may very well be inaccurate if obtained some months prior to the exchange of contracts.

A feature of the current prescribed documents is that they generally disclose matters of objective fact and relate to the vendor's ability to transfer title in accordance with the Contract. Pre-purchase reports are qualitative and subjective and relate to the condition of the property. Additionally these reports usually contain extensive disclaimers which reduce their usefulness and reliability. The reliability of a prescribed document is a central feature of vendor disclosure, and without it the confidence of purchasers to exchange contracts quickly is compromised.

8. Due to the common law principle of privity of contract.
9. See section 19 of the *Civil Law (Sale of Residential Property) Act 2003*
10. See section 18 of the *Civil Law (Sale of Residential Property) Act 2003*
11. However Australian Standard 4349.3 does provide for minimum requirements for non-invasive inspection of buildings for the activity of timber pests and preparation of associated reports.

In early April 2016, the Minister for Innovation and Better Regulation, the Hon Victor Dominello, MP, announced proposed changes to the *Property, Stock and Business Agents Regulation 2014* which will impose obligations on real estate agents to keep record of pre-purchase inspection reports that have been carried out on a property the agent is marketing for sale. Agents will be required to disclose this information (including where a copy of the report may be obtained) to prospective buyers who request a sale contract. It is anticipated that the proposals will ease some of the cost burden to purchasers by enabling a purchaser to obtain a pre-prepared report quickly and at a cheaper price than would be the case if the purchaser commissioned his or her own report. At the time of the publication of this Discussion Paper, these changes have not come into effect[12] and the impact of the reform on the issues considered in the preceding paragraphs is not known.

Issues for discussion

Q.3 Should there be an obligation on the vendor to disclose patent defects and issues relating to the condition of the property (as well as latent defects in title)?

Q.4 Should vendors be required to supply pre-purchase reports to contracts for the sale of land for all property sales at auctions?

Q.5 Should a purchaser be able to sue the author of the report if it is incorrect or negligent?

Q.6 Should the various compliance matters (e.g. window locks, balcony safety, blind cord compliance) be included as mandatory matters to be covered in building reports?

B. Strata Record Inspection Report

Buying into a strata scheme is often seen as a more affordable option to enter into the property market. Though there are many benefits of buying into a strata scheme, there are also disadvantages, many of which can be revealed through obtaining a strata record inspection report ("strata report").

A strata report can help a prospective purchaser make an informed decision about purchasing a lot in a particular strata complex. The report can provide evidence that the strata scheme is well managed, well maintained and adequately financed. It can also uncover hidden issues that would otherwise be missed, such as upcoming expenses, the imposition of significant future levies, evidence of inadequate insurance and occasionally any social problems within the scheme.

A strata report can cost between $200 and $400, subject to the size of the strata scheme. It is typically more comprehensive than a Section 109 Certificate which is generally provided during the conveyancing transaction and which discloses the amount of levies for the particular lot, whether these have been paid and the insurance policies held by the strata scheme[13].

There is no legislative guidance as to the form and content of a strata report, or who may prepare it, however section 108 of the Strata Schemes Management Act 1996 sets out those items which must be made available to someone who wishes to inspect the records. The strata report is normally undertaken by people who are typically from a property or legal background. A reputable searcher should physically inspect the records however a purchaser may choose to do so himself.

Proposing to make strata reports a prescribed document raises the same issues as pre-purchase reports discussed above, that is, the absence of a recognised standard for these types of reports, the minimum qualifications that a person must possess before they are allowed to carry out such inspections, and the lack of an industry licensing regime.

In addition, where a strata building is also part of a community scheme or has a building management committee, an inspection of the community records may also need to be obtained which will incur additional cost for the vendor and expand the size of a contract considerably.

12. Proposed to commence on 15 August 2016 - see http://143.119.201.4/regulations/2016-463.pdf
13. This certificate is normally ordered to ascertain any outstanding levies prior to settlement. If a levy is outstanding before the certificate is given and it is not shown on the certificate, the purchaser is not responsible for the payment.

Issues for discussion

Q.7 Should a strata record inspection report be a prescribed document (giving a purchaser a right of rescission if the document is not attached to the contract for sale)?

Q.8 Do purchasers find the strata report inspection report reliable? Are there circumstances where the report is not considered useful?

C. Sewerage location diagram

A diagram for the land from a recognised sewerage authority (e.g. Sydney Water) that purports to show the location of the authority's sewer in relation to the land is a prescribed document that must be attached to the contract[14]. These are commonly known as a 'sewer diagram'. Furthermore, if the land contains a part of the sewer belonging to a recognised sewerage authority (excluding private pipes), the vendor is required to specifically disclose it in the contract, or is in breach of the prescribed warranty[15]. A diagram showing the location of the sewer is usually required to satisfy the warranty.

The purpose of a sewer diagram is to show the location of the sewer and the means of connection from the property to the sewer. The location of the authority's sewer line can indicate to a purchaser whether part of a structure has been built over or adjacent to it, and if so, whether the authority may require access in the event of maintenance. The general proposition is that where a building has been built over an authority's sewer, the authority has a statutory easement to gain access to it without the requirement to compensate, rebuild or reinstate any structure to the same state as it was before.

The location of the sewer as shown on the diagram can also show a purchaser whether future development proposals of the land may be restricted. For example, if the authority's sewer passes through the backyard, it may not be possible to build a swimming pool or extension over it. The benefit of this knowledge allows the purchaser, at the time of sale, to consider whether the land and premises are suitable for their requirements before committing to the purchase.

Since 2009 there have been changes in the content of the diagrams which have resulted in less-reliable sewerage diagrams to achieve the purposes of vendor disclosure. Whilst the new diagrams appear on its face to be a modernised diagram, there is no longer a requirement by the recognised sewerage authority to show the outline of the premises (as was frequently the case). Nor may the diagram show the location of the authority's sewer.

To combat these issues, practitioners acting for vendors now generally provide more than one sewerage reference diagram to the contract of sale to satisfy their vendor disclosure requirements. For example, Sydney Water currently provides, upon the payment of a fee, two sets of diagrams for purchase - a Service Location Print and a sewer service diagram.

A Service Location Print is a diagram from an authority showing its pipes, structures and the wastewater connection point for the property. A Sewer Service Diagram (SSD) shows the location of private sewer pipes on a property. When doing sewer drainage work on a residential, commercial or industrial property, plumbers and drainers are required to submit an updated or new SSD to Fair Trading and the property owner at the completion of the drainage work.

Whilst the attachment of more than one diagram adds to the vendors costs, there is also the further problem - both diagrams may not show the location of the authority's sewer.

This may leave the vendor open to a claim of rescission if they are in breach of the prescribed warranty, even in circumstances where they attempted to provide full disclosure, compromising the protections sought for both parties. Furthermore, the content provided to the purchaser may not aid the purchaser defeating the purpose of the vendor supplying the document upfront in the contract.

The Committee noted the most obvious solution to the problem is to enforce the previous standards that applied before 2009 to reinstate the information contained within a sewerage reference diagram. This would entirely depend on the sewerage authorities.

14. Schedule 1, clause 2 of the Regulation
15. See Schedule 3, Part 1, item 1(b) *Conveyancing (Sale of Land) Regulation 2010*

Another 'solution' is to remove the requirement to supply the diagrams altogether (and also remove the associated prescribed warranty). Even though the location of an authority's sewer and connection points are of significant interest to a purchaser, if the diagrams are not accurate, or the authority's sewer cannot be located in relation to the subject property, it may not be worth attaching the documents to the contract.

Issues for discussion

Q.9 Should it be mandatory for a sewerage reference diagram (if available) to be a prescribed document?

Q.10 What has been your experience when dealing with locating the authority's sewer?

Q.11 Are the new diagrams useful in any way? Should they not be a prescribed document if they cannot be relied on?

3.2.2 Warranty in contract

Suggestions have been received that the following matters should be included as additional warranties:

A. Proposed demolition orders by council

B. Order for adequate fire safety

C. Mine subsidence issues

D. Loose-Fill Asbestos Insulation

Each of these items is discussed below.

A. Proposed demolition orders by council

The local council is empowered to remedy illegal or non-compliant buildings or structures by making a range of orders that can require the demolition or restoration of the offending structure or to otherwise bring the property into compliance with development standards. One of the warranties that the vendor must give to a purchaser under the current disclosure regime is that there is nothing that would justify the making of any upgrading or demolition order for any building or structure on the land[16].

Once an order under the *Environmental Planning and Assessment Act 1979* or the *Local Government Act 1993* is issued, it is binding on the current owner and any successive owners of the land. Many purchasers will test the vendor's warranty by undertaking a search of the council records or obtaining a building certificate prior to the exchange of contracts[17].

Before a council can issue an order, it must give the owner of the non-compliant building a proposed notice of its intention to issue the order[18]. This is essentially a warning notice – it is intended to give the owner a chance to remedy the defect before council proceeds to issue formal orders. A proposed order is not required to be disclosed by the vendor as it is not considered to be an order issued under the respective Acts. It is merely a potential order.

Most prospective purchasers would want to know whether the building that they are thinking of buying has attracted the attention of council. Disclosing that the property is subject to a proposed order at least gives the purchaser an opportunity to make further inquiries as to why the proposed order was given, and whether to risk buying a property that may in the future be the subject of a formal demolition or upgrade order from council.

A primary concern with making a *proposed* order a warranty is there may be no practical way for a purchaser to test the warranty. Privacy laws generally preclude Councils from dealing with anyone other than the owner of the land on matters which are not on the public record. Whereas a formal order can be tested by anyone by obtaining a building certificate or an outstanding notices certificate, it may be impossible for anyone but the owner of the property to obtain a copy of a *proposed* order.

16. Schedule 3, Clause 1(d) of the Regulation
17. A building certificate, upon issue, is the Council's assurance that it will not, for a period of seven (7) years, impose a non-compliant building to be demolished or altered (except in the case of fair wear and tear).
18. See section 121H of the *Environmental and Planning and Assessment Act 1979 and section 132 of the Local Government Act 1993*.

Issues for discussion

Q.12 Should the vendor warrant that he or she has not received a proposed order from council for the demolition or upgrading of a building on the land?

Q.13 Are there any other matters which the vendor should warrant or disclose regarding matters involving demolition or upgrading of buildings or structures on the land?

B. Order for adequate fire safety

Under section 121B of the *Environmental Planning and Assessment Act 1979*, the local council may issue an order on an owner to do, or refrain from doing, specified things to ensure or promote adequate fire safety or fire safety awareness. The council can order the owner to undertake maintenance where the premises constitute a significant fire hazard, such as where the premises is inadequate to supress fire or prevent the spread of fire.

Fire safety problems may not be visible by an ordinary purchaser upon first inspection of the premises and may be extremely costly to bring to compliance, particularly in shared use or commercial buildings. Owners whose property is subject to such an order are currently under no obligation to either disclose this fact or warrant that the property is not subject to a fire order from council.

Whilst anyone may make enquiries of council to determine whether a property is subject to a fire order[19], because this issue is not the subject of a vendor disclosure or warranty a purchaser must make such an enquiry before contracts are exchanged. The results of the enquiry will be the same for every person who applies for the information, and each person must apply for it separately. This creates unnecessary duplication.

By requiring the vendor provide a warranty that the property is **not** affected by a fire safety order (unless disclosed otherwise), purchasers will be able to exchange contracts quickly and test the vendor's warranty following exchange of contracts but before completion, with the comfort of knowing there is a right to rescind the contract should enquiries reveal the existence of a fire order which was not disclosed.

Alternatively, there is suggestion that fire safety orders (together with all other relevant council orders) should be disclosed in the Section 149(2) Certificate, which is a prescribed document under the Regulation. This would require amendment to legislation other than the Regulation.

Issues for discussion

Q.14 Should the vendor warrant that the property is not subject to an order for fire safety awareness?

Q.15 Should a fire safety order be a matter for disclosure in a section 149(2) certificate?

C. Mine subsidence issues

The *Mine Subsidence Compensation Act 1961* establishes a compensation scheme for lands within designated mine subsidence districts, in circumstances where improvements are damaged as a result of subsidence from the extraction of coal. If a property is within a mine subsidence district (which is evident from the Section 149(2) Certificate annexed to the Contract), a purchaser will want to ensure the property is covered by the compensation scheme should such damage occur.

The eligibility for compensation will depend on whether improvements have been erected in accordance with the Act and requirements which may have been imposed by the Mine Subsidence Board. Accordingly, it is important for a purchaser of a property within a mine subsidence district to make enquiries of the Board and confirm the structures are compliant. If enquiries reveal contravening improvements, a purchaser is entitled to rescind the purchase contract under Section 15(5) of the *Mine Subsidence Compensation Act 1961*.

Whilst protection exists for purchasers of affected properties, the Committee has suggested that it may be more appropriate for this issue be dealt with in the Regulation, possibly requiring the vendor to warrant that the land complies with the Mine Subsidence Board's requirements. A purchaser would be able to test that warranty by making the enquiries of the Board in the same manner as is presently the case, but the remedies will be consistent with other vendor warranties under the Regulation.

19. See section 121ZP of the *Environmental and Planning Assessment Act 1979*

An alternative suggestion is for Mine Subsidence Certificates (advising the compliance status of the property) to be included in the sale contract as prescribed documents for properties within mine subsidence districts. Whilst this would ensure any issue is disclosed to potential purchasers, the existence of contravening improvements does not impact upon the vendor's ability to convey title to the land – rather, it relates to eligibility for compensation in the event of future damage. It is a matter which may be investigated by a prudent purchaser following exchange of Contracts and for which a remedy exists under the *Mine Subsidence Compensation Act.*

Issues for discussion

Q.16 Should the Regulation deal with mine subsidence issues, or does the present scheme operate satisfactorily?

Q.17 If the Regulation is to deal with mine subsidence, should this be as a prescribed warranty, prescribed document or otherwise?

D. Loose-Fill Asbestos Insulation

Between 1968 and 1979, a Canberra-based company known as "Mr Fluffy" provided Loose-Fill Asbestos Insulation (LFAI) to an estimated 1000 homes in the ACT and some NSW properties. LFAI is made from finely crushed asbestos fibres and was sprayed into roof cavities as ceiling insulation. LFAI poses a significant health risk as, in this finely crushed form, carcinogenic fibres are easily disturbed and difficult to remove safely. The NSW Government has determined that the only way to alleviate the health risk in affected homes is through demolition, comprehensive site remediation and disposal. A LFAI Taskforce has been established to identify homes affected by LFAI and free testing is offered for properties within certain local government areas.

A register identifying residential properties affected by LFAI is being established and will be publicly available later this year. In addition, proposed amendments to the *Environmental Planning and Assessment Regulation 2000* will require that, where a property is listed on the LFAI Register, that information be included Council's Section 149 Certificate (which is a prescribed document attached to a contract for sale of land).

The listing of a property on the LFAI Register and information in the Council Certificate will reveal properties that have already been tested and identified as containing LFAI. However, the Taskforce has expressed concerns that purchasers may commit to purchase properties which have not yet been tested (but may still contain LFAI) and, with this in mind, has proposed that LFAI be the subject of a prescribed warranty in the Regulation. In effect, the vendor would be required to warrant that the property is not affected by LFAI. It is anticipated that this would encourage vendors to have properties inspected and tested before listing for sale.

An alternative proposal is to make the issue the subject of a warning notice that must be included in every contract for sale, alerting purchasers to the dangers of LFAI and the possibility of LFAI being used in homes constructed prior to 1980. This would bring the matter to the attention of the purchaser and enable a purchaser to make enquiries prior to purchase.

Issues for discussion

Q.18 Should the Regulation deal with the possible existence of loose-fill asbestos insulation?

Q.19 If included in the Regulation, should the existence of loose-fill asbestos insulation be the subject of a vendor warranty, warning notice or dealt with in some other way?

3.2.3 Expanding complexity of the contract

Anecdotal evidence suggests that the average size of a contract of sale for land in NSW is increasing. In some cases, this is due to the property being within a large strata or community complex and the need to include all relevant plans and dealings, of which there are usually many. However, another reason appears to be that the vendor or the vendor's legal representative is providing more disclosure than is required under the Regulation, possibly to circumvent any claim a purchaser might have for failure to comply with disclosure obligations.

Adding more pages to a contract increases the legal cost for vendors and purchasers, both in preparing the document and reviewing it. The additional complexities can also add ambiguity, additional time to make and answer requisitions, and more difficulty to test the warranties and ascertain the nature of the prescribed document. As noted above, the sale of a strata lot or any lots contained within a community scheme adds to the length of the contract as additional documents that relate to the title are required to be attached[20].

The primary concern is that an unnecessarily expanded contract can delay an exchange of contracts. Subject to any cooling off period, parties in a land transaction are legally bound once an exchange of contracts occurs. Any proposal which results in a delay in exchanging contracts is directly at odds with the objectives of the Regulation.

The movement towards a paperless society is a factor that warrants a review of disclosure requirements in the spirit of efficiency and costs savings. Are there alternate ways and more practical ways of making the prescribed documents available for both vendors and purchasers? Given that some settlements[21] can now take place entirely in an electronic environment[22] perhaps there should be consideration towards moving some of the disclosure requirements to an electronic format. Indeed, some firms have reported electronic exchanges of contracts through the use of digital signatures. Electronic disclosure documents and e-contracts would assist in streamlining the processes between exchange of contracts, settlement and lodgment of title documents for registration as the National Electronic Conveyancing framework continues to expand its operation in NSW.

Whilst this move may assist in reducing the length of contracts, it could also prove to be a double-edged sword as parties may be tempted to "over-disclose" and put as many unnecessary documents as they can on digital media such as a compact disc or USB flash drive, even through a cloud-based file sharing program. Although in theory this may help to reduce the physical contract size, in fact the content of the contract could become enormous, which in turn will increase the costs and delay the exchange of contracts.

Any solution to help reduce the size of the contract for the sale of land must not cause any unnecessary delay to the exchange of contracts.

Issues for discussion

Q.20 Does each document currently required to be attached to the contract provide useful and important information for prospective purchasers to be able to make informed choices? If not, why not?

Q.21 Should any document be removed from the list of prescribed documents? Should this relate to all sales or just for residential or commercial properties?

Q.22 Are there any circumstances in which contracts should be exempt from attaching the prescribed documents (for example, small parcels of crown land sold to adjoining landowners who may already be utilising the parcel)?

Q.23 Should the Regulation provide an alternative, electronic means of providing the prescribed documents? How might this be best achieved?

Q.24 Have you exchanged contracts electronically with the use of digital signatures? Is this a beneficial practice? Were there any challenges in this process?

20. See items 5-13 in Schedule 1 of the Regulation
21. The time at which the purchaser takes title to the land and the vendor receives the purchase price for the property
22. See National Electronic Conveyancing at www.pexa.com.au

4. Issues arising in off-the-plan contracts

Buying 'off-the-plan' occurs where a purchaser commits to buy a property in circumstances where, at the time contracts are exchanged, the land has yet to be subdivided or the strata building has not yet been constructed. In recent years, buying off-the-plan has become a popular choice with buyers, particularly for the sale of strata lots as it enables a buyer to secure a property at current prices with the expectation that the value of the property will increase by the time the contract is completed.

However, the increasing popularity of such transactions has revealed issues of growing concern, particularly in terms of contractual disclosure and the conduct of vendors over the course of the transaction. These are issues which may require review and in relation to which this Discussion Paper invites further submission.

4.1 Contractual Disclosure

The current Regulation makes special provision for off-the-plan contracts relating to strata developments. Clause 6 of the Regulation implies a term in the contract that the vendor shall serve on the purchaser an occupation certificate relating to the lot and immediate common property area at least 14 days before settlement. A purchaser cannot be compelled to complete the contract earlier than the 14 days after service of the occupation certificate and this provision cannot be excluded by contract. A similar clause applies for house and land packages.

Apart from this, the Regulation makes no specific provision for other documents relating to the proposed property to be disclosed. Issues such as the standard of finishes, the layout and amendment of common areas are often dealt with in the contract for sale but are not prescribed disclosure documents.

Importantly for potential purchasers, a vendor is not required to disclose the proposed by-laws which will govern the scheme once completed. This means that a purchaser may be unaware of potentially significant rules which will govern permitted activities within the scheme and matters of potential significance to a buyer, such as whether animals may be kept in a lot. Whether a purchaser may keep a much loved pet in a strata property is a crucial issue for many and one which should be made known to a potential purchaser before he or she commits to purchase.

The proposal that a vendor be required to attach proposed by laws to a contract for the off the plan sale of a strata unit will enable a purchaser to properly consider whether the unit will suit their needs.

Similarly, the vendor is not obliged to disclose an estimate of expected future levy contributions, meaning that a purchaser is entering into a contract without a clear picture of likely future expenses.

Another proposal is to adopt a disclosure statement similar to the one which operates in Queensland[23]. The statement, which is required to be attached to every off-the-plan contract for sale, must disclose certain prescribed information, such as a plan of the proposed lot, the estimate of the levies payable, and the by-laws that will apply to the scheme. If the disclosure statement is not attached, or is incomplete, the purchaser can terminate the contract before settlement.

The disclosure statement allows a potential purchaser to read important information up front, without having to search for it in the contract which can typically extend to hundreds of pages. This will reduce time and expense for a prospective purchaser who, by consulting the disclosure statement themselves, will be able to find and consider the relevant and significant information about the future scheme before committing to purchase.

Issues for discussion

Q.25 Is there any need for the law to address disclosure in off-the-plan sales? What issues have you encountered that were not covered in the contract for the sale of land but should have been disclosed in the contract?

Q.26 Should the by-laws be disclosed in the contract for sale for off-the-plan strata units?

Q.27 Should an estimate of future levies be included in the off-the-plan contract?

Q.28 Should a disclosure statement similar to those in Queensland be required to be attached to off-the-plan contracts?

23. See section 213 of the *Body Corporate and Community Management Act 1997 (Qld)*

4.2 Cooling Off Period

Except where a property is sold at auction (or on the day of auction after having been passed in), a 5 business day cooling off period applies to all contracts for the sale of residential property[24]. This may be waived upon the purchaser's provision of a solicitor's certificate issued under s66W of the *Conveyancing Act 1919*. A purchaser may elect to rescind the contract within the cooling off period, for any reason, forfeiting only 0.25% of the purchase price[25].

Concerns have been raised about the adequacy of the current cooling off regime for off-the-plan contracts. Solicitors have reported difficulties, particularly in larger developments, in obtaining copies of the draft contract for review and have reported circumstances where developers have contracts available for purchasers to review on site but will not permit copies to be taken away or emailed for later consideration. With the rising popularity of electronic contracts, situations have arisen, often on "launch days" of large subdivisions, where purchasers are signing contracts electronically on the weekend without the benefit of legal advice and solicitors are not receiving the signed, often lengthy, contract until some days later, with insufficient time to review before a cooling off period expires. Accordingly, it has been suggested that a longer cooling off period should apply to off the plan contracts and that purchasers should not be penalised for exercising cooling off rights in circumstances where a contract is not available to be taken away for review before signing.

Issues for discussion

Q.29 Is the standard 5 day cooling off period sufficient in off-the-plan sales? Should this be extended, and if so what time frame is appropriate for such contracts?

Q.30 Should there be any change to the amount a purchaser forfeits when exercising cooling off rights under an off-the-plan contract?

4.3 Sunset Clauses

In response to media attention and community complaints relating to the conduct of certain developers, the NSW Government introduced changes to the *Conveyancing Act 1919* in late 2015 aimed at strengthening the rights of purchasers in off-the-plan contracts.

Reports suggested that, in order to take advantage of the rising property market, certain developers deliberately delayed their projects to activate the "sunset clause"[26] and lawfully terminated contracts with the original purchasers. The properties would then be on-sold to new purchasers at a much higher price, leaving the original purchaser with no property and, whilst they were refunded the deposit paid, the original purchaser had lost the opportunity to enter the property market having been tied to the off the plan Contract, in some cases for several years.

To counter such conduct, s66ZL of the *Conveyancing Act 1919* was introduced, the effect of which is that a vendor who wishes to terminate an off-the-plan contract under a sunset clause may only do so with the consent of the purchaser or by court order, or otherwise as the Regulations may prescribe. Presently, regulations have not been made under the section although it has been suggested that provision should be made for situations of prolonged, unforeseen delay. Arguably, this is a matter that may be dealt with through the contract, allowing a vendor to extend the sunset date in circumstances of delay, for the period of the delay. Otherwise it has been suggested that the regulations should allow the vendor to terminate if development approval is ultimately not provided or if planning instruments change such that the development cannot continue under the Contract. This would raise a question of the degree to which a developer attempted to comply with requirements of council and may ultimately be better dealt with through the court order process.

24. See section 66S of the *Conveyancing Act 1919*
25. See section 66V of the *Conveyancing Act 1919*
26. Sunset clauses are common in off-the-plan contracts and can be used by either party to end the contract if the project is not completed on time.

Issues for discussion

Q.31 Have you experienced situations where a developer sought to terminate the contract under a sunset clause? Has the addition of s66ZL of the Conveyancing Act 1919 made an impact on this practice?

Q.32 Are there circumstances in which a vendor should be able to terminate the contract under a sunset clause without the purchaser's consent and without a court order? Why?

Q.33 Is s66ZL achieving its objective? If not, why not?

4.4 Other Off-the-Plan Issues

Reports have also been received of contracts being terminated due to major changes in the proposed development, such as a redefinition of lot boundaries, reduction in lot sizes and developers seeking major changes to approved development consent after contracts have been entered into.

In determining whether there is any need for intervention in such cases, regard should be had to the rights of the parties to negotiate a contract and the speculative nature of off-the-plan purchases – in essence, a buyer is taking a risk that the property purchased at present prices will, upon construction, suit his or her needs and improve in value.

Issues for discussion

Q.34 Is there any need for the law to intervene in circumstances where the vendor seeks to make changes to the proposed lot or building after exchange of contracts, even if such conduct is permitted by the Contract?

Q.35 Have you experienced any other issues in off-the-plan conveyancing which could have been resolved through legislative intervention?

5. Swimming pool certification regime

From 29 April 2016, contracts for the sale properties with a swimming pool must include a certificate disclosing the compliance status of that pool[27]. Such certificates are 'prescribed documents' under Schedule 1 to the Regulation and failure to attach the required certificate gives a purchaser the right of rescission within 14 days of exchange of contracts. If a pool is not compliant with fencing requirements, the contract must contain a Non-Compliance Certificate and a purchaser has 90 days from the date of settlement to ensure that pool is made compliant.

Presently, Schedule 1 Clause 15 requires a warning notice relating to swimming pools to be inserted in every contract for the sale of land, informing potential purchasers of the need to ensure that any swimming pool on the property complies with the requirements of the *Swimming Pools Act 1992* and noting that penalties for non-compliance apply. Following the introduction of compliance and non-compliance certificates as prescribed documents, it is proposed to amend the present warning notice to reflect the obligation imposed upon a purchaser to rectify the outstanding matters within 90 days of settlement.

Issues for discussion

Q.36 Should the Warning Notice be amended to refer to the purchaser's obligation to make a pool compliant within 90 days of settlement?

Q.37 Have you experienced any issues with the introduction of the certification regime and the new prescribed documents which require consideration in the review of the Regulation?

27. Off the plan contracts and contracts for the sale of strata/community title properties which are contained in plans comprising more than two lots are exempt from this requirement.

6. Other improvements identified by the committee

The Committee has identified several minor issues in the Regulation which may be improved. Subject to any strong opposition to these improvements, it is intended that the following will be addressed when the Regulation commences on 1 September 2017:

6.1 Only a single section 149 certificate necessary for the sale of certain rural properties

The Regulation requires that a section 149 certificate must be attached for each lot of land being sold. Rural properties, such as a farm, usually consist of several lots. Very few rural properties are spread over separate local government areas. It is therefore proposed that where a rural property being sold lies within one local government area, only one section 149 certificate is required to be attached to the contract to cover all the lots[28].

6.2 Clarify a font standard in the Regulation

Although the Regulation specifies the size value of letters, it does not specify the font. Different fonts can be smaller or bigger, even though their size values are the same (e.g. 14 point Cordia New is much smaller than 14 point Arial). A standard font should be adopted to eliminate the possibility of someone being able to rescind a contract due to the incorrect size of the letters. Subject to approval, Arial is the most likely font to be adopted[29].

6.3 By-laws

Although the existence of exclusive by-laws is an important matter, potential strata lot owners need to know much more about the scheme than that. Strata by-laws may restrict activities that can be carried on in a lot, limit the keeping of pets or impose rules on the use of common facilities. It is therefore important that a consolidated set of by-laws be made available in the contract for sale. This was an issue identified in the Government's review of the strata laws.

As a consequence, the Regulation will be amended to require that all by-laws recorded on the common property title must be attached to the contract for sale.

Issues for discussion

Q.38 Do you oppose any of the changes identified by the Committee above, and if so, why?

Q.39 Are there any other improvements to the Regulation which you would like the Committee to know about?

28. This approach is similar to the sale of strata lots. If the sale relates to more than one lot in a strata plan the Regulation allows for a single section 149 certificate to be attached - Schedule 1, clause 1.

29. An example where font is specified is clause 22 of the *Retirement Villages Regulation 2009* which requires the relevant notice to be in *"at least 14 point Arial font"*.

7. Final questions

- Should any of the existing compulsory annexures to the contract for the sale of land be removed or modified?
- Should there be any changes to the existing prescribed warranties?
- Should there be any changes to the existing implied terms and prescribed terms?
- Should there be any changes to the existing purchasers' remedies?
- Are there any other documents that should form part of the review that are not discussed in this paper?
- Any other considerations that should be taken into account?

8. Invitation to comment

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

Please refer to page 3 of this paper for information on how to make a submission.