



Regulatory Impact Statement

Conveyancing (Sale of Land) Regulation 2022

June 2022

Submissions accepted until Friday, 15 July 2022

Forward all submissions to: ORG-Admin@customerservice.nsw.gov.au

By mail: *Conveyancing (Sale of Land) Regulation 2022*
Office of the Registrar General
McKell Building
Level 7, 2-24 Rawson Place
SYDNEY NSW 2000





Regulatory Impact Statement – *Conveyancing (Sale of Land) Regulation 2022*

Office of the Registrar General
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

1300 318 998
+61 2 9219 3600 – international

ORG-Admin@customerservice.nsw.gov.au
www.registrargeneral.nsw.gov.au

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1. Background information

Why is the Regulation being made?

The *Conveyancing (Sale of Land) Regulation 2017* is due to be repealed on **1 September 2022**.

Under the *Subordinate Legislation Act 1989*, most regulations are scheduled for automatic repeal after five years. This is to ensure that they remain relevant and fit for purpose. Regulations that are due for repeal can be remade (either with or without amendment), postponed or allowed to lapse.

As there is no reason to repeal the Regulation, the Department of Customer Services proposes to remake the Regulation with minor changes. The proposed *Conveyancing (Sale of Land) Regulation 2022* (**proposed Regulation**) has been drafted for consultation.

This Regulatory Impact Statement (**RIS**) sets out the rationale and objectives of the proposed Regulation and various options for meeting those objectives. It also provides an assessment of the costs and benefits of each of the alternative options.

The proposed Regulation is a draft. It has been released with this RIS so that interested parties can review it and provide comments. We are seeking feedback on any of the specific matters raised in this RIS, or otherwise contained in the proposed Regulation. All submissions will be considered, and any necessary changes will be made to address the issues identified before the final Regulation is published.

2. Consultation process

Public consultation on the proposed Regulation

The proposed Regulation and this RIS are available on the NSW Government's Have Your Say website.

The Department of Customer Service has published a notice about the release of the proposed Regulation and RIS in the NSW Government Gazette.

How to make a submission

Interested individuals and organisations are invited to provide a submission on any matter relevant to the proposed Regulation, whether or not it is addressed in this RIS.

We prefer to receive submissions by email and ask that documents are provided in an 'accessible' format. Accessibility is about making documents easily available to all members of the public, including those who have an impairment (such as visual, physical or cognitive). Further information on how you can make your submission accessible is contained at webaim.org/techniques/word/.

Submissions can be made by:

- Emailing your written submission to: ORG-Admin@customerservice.nsw.gov.au
- Posting your written submission to:

Conveyancing (Sale of Land) Regulation 2022

Office of the Registrar General
McKell Building
Level 7, 2-24 Rawson Place
SYDNEY NSW 2000

Submissions close at midnight on 15 July 2022.

Confidential submissions

We will make all submissions publicly available on the Have Your Say website. If you do not want your personal details or any part of your submission published, please say this clearly in your submission and tell us why. Automatically generated confidentiality statements in emails are not sufficient.

Even if you state that you do not want us to publish certain information, we may be required by law to release that information, for example, to comply with the *Government Information (Public Access) Act 2009*. The Department will also provide all submissions to the Legislation Review Committee of NSW Parliament. This is a statutory requirement.

Evaluation of submissions

The Department will carefully consider each submission. If necessary, we will amend the proposed Regulation to address issues raised in the consultation process. If we need more information, we may consult with key stakeholders before finalising the new Regulation.

Commencement of new Regulation

Once the new Regulation has been finalised, the Department will submit it to the Governor for approval. Prior to commencing, the new Regulation will be published on the NSW Legislation website at www.legislation.nsw.gov.au.

We expect that the new Regulation will commence on **1 September 2022**.

3. Objectives of the Act and proposed Regulation

The proposed Regulation is made under the *Conveyancing Act 1919 (the Act)*, the key objectives of which are to:

- consolidate the law of property in NSW, and
- simplify and improve the practice of conveyancing.

The current Regulation supports the objectives of the Act by facilitating the early exchange of contracts for the sale of land through a vendor disclosure regime. The regime requires vendors to make certain warranties in, and attach prescribed documentation to, contracts for the sale of land, these relating to issues of title and the property's use. Similar provisions apply to options for the purchase of residential property.

The Regulation permits a purchaser to rescind the contract where the vendor has not met prescribed disclosure obligations. Because of these protections, purchasers can exchange contracts with minimal pre-purchase investigation, reducing incidences of gazumping.

The objectives of the Regulation are to:

- speed up conveyancing transactions
- reduce the period between verbal agreement and entry into a legally binding contract
- provide protection for purchasers who enter into a contract relying on the prescribed documents and the vendor's warranties
- maintain the conveyancing objective of balancing what a vendor must disclose with what a purchaser can reasonably confirm through their own enquiries.

Need for government intervention

It is necessary to make new regulations because:

- The *Conveyancing (Sale of Land) Regulation 2017* is to be repealed on **1 September 2022** pursuant to the operation of the *Subordinate Legislation Act 1989*.
- If the Regulation is not remade by **1 September 2022** it will lapse by operation of statute, disrupting the regulatory environment and varying the status quo.

The proposed Regulation remakes the current Regulation with some minor amendments to address gaps in the treatment of contracts arising from certain options, as has been identified by conveyancing industry stakeholders. Otherwise, the Regulation updates existing provisions to modernise and simplify language, in line with current drafting practices.

Remaking the Regulation provides the most efficient and effective means of realising the objectives of the Act.

4. Impact assessment of options

Options for achieving objectives

The proposed Regulation is intended to provide operational and administrative detail to support the objectives of the Act. Options for achieving those objectives are:

Option 1 – Take no action: allow the current Regulation to lapse under the sunset provisions of the *Subordinate Legislation Act 1989* and do not make any replacement Regulation

Option 2 – Maintain the status quo: Remake the existing Regulation with no change.

Option 3 – Make the proposed Regulation: Remake the existing Regulation with minor amendments to improve upon the current regime.

Criteria used to assess the regulatory options

The following criteria have been used to evaluate the options:

- The extent to which the option:
 - supports the objectives of the Act and
 - does not impose unnecessary red tape or increase the regulatory burden.
- The cost effectiveness of each option, in terms of costs and benefits to the community, industry and government.

Summary and preferred option

After analysing the costs and benefits of each option to the community, industry and government, the option that supports the objectives of the Act and contributes to the overall efficiency of the regulatory system is **Option 3 – Make the proposed regulation**.

A summary of the costs and benefits for all four options is shown in table 1.

Table 1: Summary of costs and benefits of each option

	Option	Likely costs	Likely benefits	Overall benefit
1	Take no action	High	Low	Negative
2	Maintain the status quo	Low	Medium	Neutral
3	Make the proposed Regulation	Low	High	Positive

A more detailed assessment of these options is set out below.

Detailed assessment of options

Assessment of Option 1 – Take no action

If the Regulation is not remade by 1 September 2022 it will lapse by operation of statute, disrupting the regulatory environment and varying the status quo. Not making the proposed Regulation will pose a risk to the community in that from 1 September 2022 there would be no appropriate framework supporting the objectives of the Act.

Costs

This option represents a significant cost to the community. There are likely to be significant expenses for buyers, who will have to conduct lengthy and expensive investigations into the vendor's title to property which may not reveal issues that could have been disclosed by a vendor. The resulting protracted investigation and contract negotiation process will lead to an increase in the incidences of gazumping, as well as an increase in conveyancing costs.

Benefits

The primary benefit of this option is that it does not require any further action from Government and stakeholders in respect of drafting a new Regulation.

Conclusion

Option 1 is not considered viable. Allowing the Regulation to lapse will pose an unacceptable risk to the community and will lead to an inefficient, uncertain, and delayed conveyancing process which is not in the public interest and is contrary to the objectives of the Act.

Purchasers will be forced to commit to buy properties without adequate information about what is being purchased and will have limited remedies available to them if property differs from what has been advertised, particularly where properties are sold off the plan. The costs to the community outweigh the limited benefits presented by this option.

Assessment of Option 2 – Maintain the status quo

The Registrar General can remake the current Regulation with no amendments. Maintaining the status quo will ensure that the matters included in the current Regulation will continue to be regulated in their present form. However, there are some items in the current Regulation which require clarification, particularly in relation to contracts arising from options (discussed below).

Costs

Remaking the Current Regulations would result in no additional cost to Government.

Benefits

The primary benefit in maintaining the status quo is that there are minimal costs to Government and that stakeholders will remain familiar with the current Regulations. However, there are other matters set out in the proposed Regulation that are not addressed by the current Regulations, which have been flagged by stakeholders as concerns which should be addressed.

Conclusion

Option 2 is not considered viable. Remaking the current Regulation without change is not the preferred option, as there are items in the current Regulation which require clarification.

Assessment of Option 3 – Make the proposed Regulation

Making the proposed Regulation is the preferred option, as the amendments address the concerns of stakeholders and do not present any significant increase in costs to the community, industry or Government.

Costs

This option will not impose any additional cost to Government but may result in some minor implementation costs to industry. Conveyancing practitioners will need to review and possibly update draft contracts to ensure compliance with the new Regulation. However, this impact is expected to be minimal as many of the provisions reflect existing requirements understood by industry, and a transitional provision included in the Regulation will also assist practitioners adapting to new requirements.

Benefits

The primary benefit of this option is that it allows the Act to be supported by the considered proposed Regulation. The proposed Regulation reflects existing requirements, simplifies and updates wording, and seeks to clarify currently uncertain issues relating to the treatment of contracts arising from options, in response to industry concerns.

Conclusion

Option 3 is the preferred option. The Act provides for regulations to set out specific detail necessary to support its operation and to ensure adequate disclosure and protections for purchasers of land in NSW. The proposed Regulation addresses stakeholder concerns and ensures that recognised requirements are maintained and enforced. Costs to the community will be minimal.

5. Discussion of the proposed Regulation

Submissions are welcome on the whole proposed Regulation, or on specific provisions, or any other relevant issue. A summary of all provisions in the proposed Regulation is also set out in the table on page 16.

The Department is otherwise seeking feedback on several key issues affecting the proposed Regulation:

Size of the contract

A growing concern among conveyancing industry professionals and the public is the increasing size of the contract for sale of land. While contract terms themselves are not generally lengthy, the disclosure documents are often considerable, particularly for large strata or community developments. It is not uncommon for these contracts to be several hundred pages long and it can be difficult for purchasers to understand all of the information contained in such a very lengthy document.

This RIS is seeking feedback on whether any documents currently required to be included in the contract should be omitted (see below). However, if the information a vendor must disclose cannot be reduced, consideration must be given to more practical and efficient ways for that disclosure to occur.

In 2018, the Government introduced changes to allow contracts to be digital, and for disclosure documents to be provided in digital format. As conveyancing practice has adjusted to this change and electronic contracts have become the norm, the Department is seeking feedback on more effective ways for disclosure to occur, which address the complexity of the contract while still ensuring purchasers have access to key information.

This might be achieved by permitting disclosure documents to be referenced in an electronic contract by link, rather than for the full text to be included in the contract itself. However, this option carries the risk that purchasers will not look at the linked material and may not be aware of issues affecting the land. Vendors may also be tempted to over-disclose, linking to a range of material relevant to the property, beyond the key issues a purchaser will want to know. A more complicated disclosure is likely to increase the costs and delay the exchange of contracts.

Reforms to address the size of the contract must not cause any unnecessary delay, or place the purchaser at a disadvantage.

- 1. If the information a vendor must disclose cannot be reduced, what other methods could be considered for vendors to disclose key information about the property, without attaching documents to the contract?**

Prescribed documents and warranties

The existing Regulation establishes a robust vendor disclosure regime which requires the vendor to attach certain documents to the contract, and make certain warranties, about issues that may affect the vendor's title to the property, or the use to which the land may be put. While purchasers must still make their own enquiries to determine whether the property suits their needs, the disclosure regime recognises that there are certain matters affecting the property which are within the vendor's knowledge, or readily available to a vendor upon application.

Disclosure of key issues up-front in the contract allows purchasers to exchange contracts quickly, with minimal pre-purchase investigation, reducing the opportunity for gazumping.

For the purposes of s 52A(2)(a) of the Act, the vendor must attach to the contract those documents set out in Schedule 1 to the proposed Regulation. These documents address five key issues:

- Title – the folio for the land is to be attached plus all recorded easements, restrictions and other relevant documents, like management statement or by-laws applying to strata title property;
- Zoning – a planning certificate from council;
- Sewerage – a diagram or diagrams from the water authority showing the location of the sewer main, and sewerage infrastructure affecting the property;
- Boundaries – a copy of the registered plan;
- Swimming Pools – compliance with pool safety barrier requirements.

These documents help purchasers determine whether 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.

For off the plan contracts, additional disclosure requirements apply. Contracts must include documents relating to the land to be subdivided, as well as a prescribed Disclosure Statement and proposed documents relating to the development, which are set out in Part 2 of Schedule 1.

The proposed Regulation has updated the prescribed documents and warranties to clarify wording and remove outdated legislative references, but has not prescribed any new disclosure items.

However, there may other issues that should be disclosed to a purchaser in the contract, and should be prescribed by Regulation. Conversely, there may be documents or issues that currently

need to be disclosed, but are no longer considered relevant. The Department is seeking feedback on whether there should be any change to the prescribed documents and warranties.

Any proposed change to current disclosure items 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);
- The need to balance the vendor's obligation to disclose and the purchaser's responsibility to undertake 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; and
- Cost of compliance - cost savings to the purchaser is equally as important as it is to the vendor.

2. **What additional matters, if any, should the vendor be required to disclose in the contract? Should these be addressed as a prescribed document in Schedule 1, or by a prescribed warranty in Schedule 2?**
3. **Are there any currently prescribed documents or warranties that should be omitted when the Regulation is remade? If so, please explain why this disclosure is considered unnecessary.**

Issues affecting options

Put and call option deeds are commonly used in land transactions (particularly by developers). The 'call' aspect of the option is an enforceable right exercised by the buyer, compelling the vendor to sell. The 'put' option operates in the reverse: this is granted to the seller by the buyer, which permits the seller to compel the buyer, at a future point in time to purchase the property.

The proposed Regulation addresses issues relating to contracts arising from certain options, which have been identified as concerns by legal industry representatives.

Put options - addressing *BP7 Pty Ltd v Gavancorp Pty Ltd [2021] NSWSC 265*

A recent Supreme Court decision of *BP7 Pty Ltd v Gavancorp Pty Ltd [2021] NSWSC 265* highlighted an unintended anomaly in the legislation in relation to put options, which has led to considerable uncertainty in the security of agreements.

In that case, the Court considered that "option to purchase property", as described in the Act, should be given its ordinary meaning: that is, an option able to be taken (by the holder of the option) to purchase certain property. A put option is not an option of that character and does not involve the exercise of a choice to purchase property.

Cooling off periods

The Regulation addresses one aspect of that case, relating to cooling off periods. Under section 66S of the Act, there are cooling-off rights for contracts for the sale of residential property unless an exception under section 66T applies. There is no cooling-off period if the contract is made in consequence of the exercise of an 'option to purchase' property, other than an option that is void. By characterising a put option as an option to *compel* a purchase, the Court in *Gavancorp* allowed the purchaser to exercise cooling off rights and withdraw from the resulting contract.

Section 17 of the proposed Regulation addresses this issue by confirming that a contract arising from an option to compel a purchase is not subject to the cooling off period in s66S of the Act, extending the exemption provided in s66T.

Vendor disclosure

The Supreme Court decision in *Gavancorp* has cast some uncertainty as to the application of Division 9 of the Act, and Part 4 of the Regulation to put options, and contracts arising from put options. While the Regulation addresses the application of cooling off periods to contracts arising from put options, other provisions relating to disclosure documents, warranties and implied terms are set out in the Act and may require an amendment to the Act for clarification.

Contracts arising from options to purchase land – vendor disclosure and warranties

Section 6 of the proposed Regulation has been inserted to clarify the application of vendor disclosure requirements to contracts arising from options to purchase land.

In the current Regulation, clause 11 (exemptions) operates to exempt such a contract out of the whole of the regime of vendor disclosure, warranties and implied terms imposed under section 52A(2) of the Act.

For vendor disclosure and warranties, this is logical, because the option agreement will include the proposed contract, with relevant disclosure documents attached, and the grantee/purchaser will have had sufficient time to satisfy itself regarding the matters covered by the disclosures and warranties.

However, the current exemption has the effect of switching off implied terms relating to matters relevant to the purchaser's obligation to complete the contract, being:

- service of a current land tax certificate before completion,

- service of an occupation certificate for certain properties before completion,
- the off the plan compensation regime where changes are made during the development from what was originally disclosed.

Section 6 of the proposed Regulation provides the exemption for these contracts from vendor disclosure obligations, but such a contract is still subject to implied terms.

- 4. Should the Act be clarified to confirm that vendor disclosure requirements apply to put options in the same way that they apply to call options?**
- 5. Should the cooling off period exemption in Section 17 of the Regulation be progressed separately to any clarifications about put options in the Act?**
- 6. Are there any other circumstances in which an option or a contract arising from an option should be exempted from complying with disclosure requirements in the Act or Regulation?**

6. Summary of the proposed Regulation

Part 1	Preliminary
Section 1	provides the name of the proposed Regulation.
Section 2	provides the date of commencement of the Regulation as 1 September 2022.
Section 3	sets out definitions for references used in the Regulation (<i>references include reference to a copy of the document</i>).
Part 2	Contracts for sale of land
Section 4	sets out documents requirements to be attached to a contract in Schedule 1, Part 1 of the proposed Regulation for the purposes of section 52A(2)(a) of the Act.
Section 5	sets out implied warranties are prescribed in Schedule 2, Part 1 of the proposed Regulation for the purposes of section 52A(2)(b) of the Act.
Section 6	exempts a contract listed in Schedule 4, section 9 of the Act from Division 1 of the Regulation.
Section 7	prescribes Schedule 3, section 1 of the proposed Regulation for the purposes of section 52A(2)(b) of the Act.
Section 8	sets out the prescribed terms relating to land tax for the purposes of section 52A(2)(b) of the Act.
Section 9	sets out the prescribed terms for off the plan contracts in Schedule 3, items 4-6 of the proposed Regulation for the purposes of section 52A(2)(b) of the Act.
Section 10	sets out the prescribed implied terms if strata units are bought off the plan in Schedule 3, item 7 of the proposed Regulation for the purposes of section 52A(2)(b) of the Act.
Section 11	sets out the prescribed terms for land and house packages in Schedule 3, item 8 of the proposed Regulation for the purposes of 52A(2)(b) of the Act.
Section 12	sets out the prescribed information that must be included in a draft plan for the purposes of section 66ZM(2)(a) of the Act.
Section 13	sets out, in Schedule 1, Part 2 of the proposed Regulation, the prescribed information that must be listed in a disclosure statement for the purposes of section 66ZM(2)(b) of the Act.

Section 14	sets out the prescribed persons or bodies for the purposes of section 52A of the Act.
Section 15	sets out a contract listed in Schedule 4, Part 1 or Schedule 4, item 8 or 10 or land described in Schedule 4, Part 5 of the Regulations as exemptions for the purposes of section 52A of the Act.
Section 16	sets out the required statement in Schedule 5, Form 1 relating to a cooling off period for the purposes of s66X of the Act.
Section 17	<p>sets out that:</p> <ul style="list-style-type: none"> • contracts listed in Schedule 4, Part 1 or 3; or • land described in Schedule 4, Part 5, <p>are exempt from Part 4, Division 8 of the Act, for the purposes of section 66Y(3) of the Act.</p> <p>However the above exemption does not apply to:</p> <ul style="list-style-type: none"> • a contract for the sale of residential property by a mortgagee exercising a power of sale; or • a contract for the sale of the equity of redemption in residential property. <p>Section 66S of the Act, which deals with cooling off periods, does not apply to a contract made in consequence of the exercise of an option to compel the purchase of land.</p>
Section 18	sets out that the warranty in Schedule 2, Part 2 is prescribed if a proposed contract for the sale of land and the prescribed documents are attached to the option for the purchase of a residential property, for the purposes of section 66ZA(1) of the Act.
Section 19	sets out the options listed in Schedule 4, Part 4 and the land described in Schedule 4, Part 5 as exemptions for the purchase of a residential property, for the purposes of section 66ZK(3) of the Act.
Section 20	prescribes the statement in Schedule 5, Form 2 in relation to cooling off periods (which must be clearly legible and prominently located) for the purposes of section 66ZH of the Act.
Section 21	sets out the circumstances under which a purchaser may rescind a contract or option and the notice and service requirements to give effect to the rescission.
Section 22	supports section 21 and sets out a purchasers method of rescinding a contract or option under section 21 and the form of notice of contract rescission.

Section 23	<p>supports sections 21 and 22 and sets out the effect of notice of rescission of contract or option. This section outlines:</p> <ul style="list-style-type: none"> • when the rescission takes effect; • that, when a contract for the sale of land is rescinded, the vendor must refund the deposit and any other money paid; • that, if an option to purchase residential property is rescinded, the vendor must refund to the purchaser any consideration paid in relation to the option and any deposit; and • that this section does not limit liability in respect of damages or expenses from a breach of term (amongst other things).
Section 24	<p>sets out the:</p> <ul style="list-style-type: none"> • prescribed matters included in section 66ZL(1)(e) of the Act, definition of <i>material particulars</i>, • excluded matters from section 66ZL(1) of the Act, the definition of <i>material particular</i>, <p>for off the plan contracts for the purposes of section 66ZL of the Act.</p>
Section 25	<p>sets out that Part 4, Division 10 of the <i>Conveyancing Legislation Amendment Act 2018</i> (except section 66ZS) does not apply to an off the plan contract signed after the commencement of the Division if the contract arose from an option entered into before that commencement, for the purposes of section 66ZU(4) of the Act.</p>
Section 26	<p>sets out the transitional provisions so that the <i>Conveyancing (Sale of Land) Regulation 2017</i> continues to apply as if the Regulation were still in force in relation to an Act, matter or thing done in connection with a contract or option entered into:</p> <ul style="list-style-type: none"> • immediately before the repeal of the Regulation; and • between the commencement of the proposed Regulation (anticipated 1 September 2022) and 1 March 2023.
Section 27	<p>is a transitional provision relating to a planning certificate issued under the <i>Environmental Planning and Assessment Regulation 2021</i>.</p>