

REVIEW OF VENDOR DISCLOSURE
**FOR RESIDENTIAL PROPERTY
SALES IN NSW**

*MATT BROWN MP
MEMBER FOR KIAMA*

December 2010



Parliament of New South Wales
Legislative Assembly

MATT BROWN MP
Member for Kiama



The Hon Kristina Keneally
Premier
Minister for Redfern Waterloo
Level 39, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

8 December 2010

Dear Premier

It is with much pleasure that I present to you my findings on my Review of Vendor Disclosure for Residential Property Sales in New South Wales for your consideration.

I have investigated and made several recommendations that are designed to improve conveyancing practice in New South Wales for the benefit of vendors, consumers and practitioners.

I hope you find the results of my investigations in this review insightful.

Yours sincerely

A handwritten signature in black ink that reads 'Matt Brown'.

Matt Brown MP
Member for Kiama

Cc: The Hon A B Kelly MLC, Minister for Planning, Minister for Infrastructure, Minister for Lands

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PART 1: Introduction

Vendor disclosure is an important issue for the government, home sellers and buyers alike. Ideally, appropriate vendor disclosure should give the buyer enough information to gauge whether the property they are interested in buying satisfies their requirements. In its most beneficial form, the disclosure of information in a useful, clear and inexpensive way would strengthen the NSW property market.

The goal of this review has been to investigate whether the current vendor disclosure regime is satisfactory or should be expanded to include information in relation to the condition of a building, by requiring the inclusion of documents such as a building and pest inspection report. A specific focus of the review has been to compare the NSW vendor disclosure system with the ACT conveyancing regime, where reports of this nature form a mandatory part of the sale transaction. The review has considered whether requiring pre purchase reports with the contract for sale of land would strengthen the conveyancing process or just add further complexity to it. Investigations have revealed both a case for and against such a proposal.

The expansion of the current disclosure provisions to require the attachment of pest and building reports by the vendor has been investigated on a number of occasions since the introduction of vendor disclosure in NSW. Again, akin to previous reviews, the arguments both for and against have resurfaced. Whilst a number of bodies have expressed support for the inclusion of these additional reports to a contract, other comments oppose such a change.

The terms of reference guiding this review are described below:

That Matt Brown MP:

- 1. Investigate the information provided to prospective purchasers relating to the physical condition of a building for residential real property in NSW;*
- 2. Compare the information required to be provided to purchasers of real property in NSW with other comparable jurisdictions, in particular, the ACT;*
- 3. Investigate the types of reports that are available to help inform a potential purchaser of the physical condition of the building, including, but without being limited to pest and building reports;*
- 4. Consider the cost and benefit of requiring the vendor to provide potential purchasers with access to one or more of the reports identified above;*
- 5. Consider whether the same requirements may apply to property offered by auction and/or private treaty;*
- 6. Seek submissions from the public and relevant stakeholders on these issues; and*
- 7. Report back to Cabinet on the above with recommendations, if any, on any changes that could strengthen current laws and practices.*

I take this opportunity to thank all contributors in this review, in particular, the individuals who provided their time and expertise to form the specialist panel at the Public Forum that convened at Parliament House NSW as part of this review on 15 September 2010.

I also thank the participants who attended the forum, as well as the authors of submissions made to this review. The Specialist Panel members and forum participants are identified in Annexure A. The authors of submissions are acknowledged at Annexure B.

Please note that the information contained within this document has been prepared for cabinet's consideration and has not been intended as a substitute for legal advice. Persons should approach their legal advisor before relying on the information contained within this publication.

PART 2: Scope of the Problem and the Need for Reform

It has been reported that at least 30 per cent of homes in NSW are likely to have significant building faults 'resulting in substantial repair costs which are liable to be unknown to consumers who purchase the property without a pre purchase inspection or who will use a provider with insufficient skills or scope of inspection'¹.

Thus the possibility that a purchaser will contract to buy a property that is affected by a significant defect, without prior knowledge of the nature of the defect, is significant. Having advanced knowledge of a building's aspects and deficiencies will assist purchasers in deciding whether a property is suitable for their particular requirements.

The upfront cost of obtaining pre – purchase reports may vary considerably depending on the nature of the report requested. Under the current vendor disclosure regime the reports are paid for by the potential purchaser, who runs the risk of being an unsuccessful bidder at auction. The financial burden is multiplied for potential purchasers where several reports have been commissioned on different properties during the house hunting experience.

Of underlying concern is the possibility that today's property buyers are undertaking fewer enquiries on properties they are considering purchasing, mostly in the hope of saving the costs of reports at the risk of being an unsuccessful buyer².

In the Australian Capital Territory (ACT), a different approach is undertaken. A vendor is required by law to provide pre – purchase reports to potential purchasers at the point the property is first marketed for sale. What this review has considered is whether the introduction of a similar system into NSW would provide costs or benefits for purchasers.

A fundamental driver of this review has been not only to assess if and where the current conveyancing practice can be improved in NSW, but how to achieve cost savings for home buyers. The vendor disclosure system operating in the ACT is a system designed to mitigate costs for purchasers by reducing the need to obtain multiple reports on the same property, particularly at auction.

Bidding at auction carries with it, a particular element of risk as there is no cooling off period³. This is where buyers are advised to ensure that the property is suited to their needs since at the fall of the hammer, the sale becomes contractually binding between the vendor and the highest bidder.

It is before auction where a pest inspection and building inspection report would benefit a prudent purchaser and, in ideal circumstances, the purchaser should have access to these reports.

During the review, it was commented⁴ that 'most buyers almost always purchase their homes at the borderline of their budgets'. If this is a reality for many purchasers, than a significant building defect, such as a faulty roof requiring replacement, stump degradation or the presence of timber pests would add to the cost of the purchase price of the property. This leaves the purchaser in a vulnerable position because without advance knowledge of a property's defect/s, excessive unforeseen repairs and remedial costs would add further financial and emotional strain.

This situation leaves the purchaser worse off in another respect – an uninformed purchaser loses the opportunity to further negotiate the sale price of the property, taking into account its defects and in effect, paying what may be deemed an excessive price.

1 Archicentre Limited Submission, September 2010

2 This review acknowledges that there were no accurate statistics measuring the extent of monetary loss for the number of persons short of pocket as a result of obtaining reports for properties they did not actually purchase. Although it is imagined that it has become a real possibility for many purchasers, particularly at peak times of property sales.

3 Section 66T(b) Conveyancing Act 1919 (NSW)

4 Michael Ferrier, Director, EyeOn Home Reports

PART 3: Caveat Emptor

The doctrine of caveat emptor stems from the latin principle 'caveat emptor, qui ignorare no debuit quod jus alienum emit' – 'let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.'

Any paper assessing vendor disclosure should make reference to this venerable doctrine which particularly flourished in the 19th century and has become a well known property law principle for buyers all over the world.

Under a common law caveat emptor regime, the purchaser must make his or her own investigations of the property. The vendor is under no legal obligation to unilaterally disclose matters going either to the quality of title or condition of structure/s.

Until the mid 1980's in NSW, this principle governed land transactions. Before committing to buy the land, the purchaser would have to ensure that there were no serious affectations on the title, no government proposal, (such as intended road widening) that may impact upon the property, and no structural faults that would impact on the quality of the building. Various commentaries have suggested that caveat emptor is a harsh principle because the practical effect of the doctrine means that the purchaser assumes all the risk without having had possession of the property. This is particularly relevant in cases of insidious or hidden damage such as the effects of present or past pest infestation.

Under this doctrine, the buyer and the seller are not equal players in the sales transaction. In recognition of this disparity, most states in Australia have introduced some form of mandatory vendor disclosure.

Whilst there are obvious flaws in the principle of caveat emptor it is important to ensure that regulation does not swing the onus too far the other way. An assumption of risk is a reality in every property transaction, as it rests with the purchaser to assess the suitability of an intended purchase for the envisaged need.

PART 4: Legislative Vendor Disclosure Regimes

Whilst the assumption of risk by purchasers is unavoidable, concerns have quite properly been focused on assisting purchasers to make properly informed decisions. It is this concern which has given rise to the several vendor disclosure regimes that currently operate in Australia.

In its simplest description, conveyancing is the process used for the transfer of the legal ownership of land from one person to another. It may be simply broken into two components:

1. The process leading up to and including the sale of land and the acquisition by the vendor and purchaser of rights and obligations under the contract for sale; and
2. The process by which the change in ownership effected by the sale is given effect to by the state through the registration of a title in the name of the purchaser.

This paper addresses deficiencies in the first abovementioned process.

The Vendor Disclosure Obligations in NSW

In New South Wales, aside from common law principles, the legislation governing conveyancing and registration of title stems from:

- *Real Property Act 1900*
- *Conveyancing Act 1919*
- *Conveyancing (Sale of Land Regulation) 2010*

In 1986 section 52A to the Conveyancing Act 1919 as well as the *Conveyancing (Vendor Disclosure and Warranty) Regulation commenced*. Section 52A of the *Conveyancing Act 1919* establishes a system of vendor disclosure and warranty that forms the basis of conveyancing. The section requires a vendor to attach certain documents to the contract for sale and to include certain terms, conditions and warranties. The aim of the section is to ensure that a purchaser is provided with a contract for sale that gives sufficient detail about the property to enable the purchaser to enter into a binding contract quickly without having to go through extensive areas of inquiry before exchanging contracts.

This amendment achieved a significant change in the conveyancing process. From a conveyancing system fraught with delay and inconsistency, this change saw the introduction of vendor warranties, enabling the purchaser to secure the property by exchanging quickly. The purchaser was able to confirm the warranties after exchange, thus lessening the opportunity for gazumping.

Consistent with the intent of section 52A, the current Conveyancing (Sale of Land) Regulation 2010 ('the Regulation') includes a range of measures designed to streamline the conveyancing process. Those measures include:

Vendor Disclosure – The Regulation requires that the vendor disclose information about the land by annexing certain prescribed documents to the contract for sale. The prescribed documents provide information relating to title, zoning, sewerage, easements and covenants.

Vendor Warranty – The Regulation prescribes a list of matters that the vendor is deemed to warrant do not affect the property, unless they are specifically disclosed in the contract.

Special provisions for residential properties –

- **Cooling – off period** –
The Act gives purchasers a 5 business day cooling – off period following exchange of contracts. The cooling – off period may be waived upon completion of a section 66 W Certificate and does not apply where the property is sold at public auction.
- **Implied term for residential land and house packages** –
a provision which mandates the inclusion in the contract of sale of an occupation certificate, thereby permitting residence within the dwelling.

Although the current regulation makes provision for vendors warranties relating to issues of title and matters that would impact on the potential use of the property, no provision is made for disclosure for matters relating to the physical condition of any building erected on the land.

As a result, purchasers wishing to satisfy themselves as to the quality and state of the building need to obtain a building inspection and pest inspection report at their own expense.

The standard 42 day settlement period prescribed by the Contract for the Sale of Land serves two purposes – it allows time for the purchaser to test the warranties of title and time for the vendor to make arrangements to hand over possession of the property. The current Regulation runs parallel to this process.

The Vendor Disclosure Obligations in the ACT

On 1 July 2004, the ACT introduced a new vendor disclosure system becoming the first and to date, the only Australian jurisdiction to require certain pre – purchase reports, including pest and building inspection reports, to be annexed to the contract of sale for residential property. The legislation was designed to reduce gazumping, enhance consumer protection measures for both buyers and sellers of residential property, and to introduce new public auction rules to increase transparency and limit dummy bidding.

The legislation governing the procedure for selling residential property is the *Civil Law (Sale of Residential Property) Act 2003* and its accompanying Regulation. Section 9 of the Act specifies the 'required documents' that must be included within the contract for sale. This is the section that specifically requires the attachment of a copy of a pest inspection and building inspection report.

For completeness, the following are the required documents that must be attached to a contract for the sale of an existing residence⁵:

- A copy of the contract for the sale of residential property
- A copy of the crown lease
- A copy of the certificate of title
- A copy of any encumbrance shown on the certificate of title
- Asbestos assessment report or asbestos advice
- A statement about any encumbrance not shown on the certificate of title
- A copy of the deposited plan
- A copy of the following building conveyancing inquiry documents provided by the ACT Planning & Land Authority (ACTPLA):
- Certificate of occupancy

5 Excerpted from 'Reality Check A Real Estate Guide for Buyers and Sellers in the ACT' at page 62:
http://www.ors.act.gov.au/fairtrading/pdfs/Industries/Guides/REALITY_Check.pdf

- Survey certificate
- approved building plans
- Drainage plan
- Building file summary sheet
- A copy of the following lease conveyancing inquiry documents (if any exist) provided by ACTPLA:
- Statement about heritage listing
- Statement about outstanding rent under the crown lease
- Statement about development applications affecting the property
- Statement about breaches of the crown lease
- Statement about any orders issued against the property
- Statement about whether a compliance certificate (compliance with provisions of crown lease) has been issued
- Statement about applications for dual occupancy
- Contaminated land search
- Energy efficiency rating statement
- Building and compliance inspection report; and
- Pest inspection report.

The following conditions also accompany every contract of sale. The conditions are included in all contracts for the sale of residential property:

- the property is sold free of encumbrances;
- the buyer is entitled to vacant possession;
- that there are no unapproved structures, except as disclosed in the contract;
- that the buyer may not make any requisitions on the title to the property;
- that there are no unsatisfied judgements, orders or writs affecting the property; and
- that the required documents form part of the contract.

Upon completion of the contract, the purchaser is required to reimburse the vendor for the cost of the reports⁶. The Regulation governing this process standardises the minimum content of these reports and all inspections must be consistent with Australian Standards⁷.

The required documents must be made available at a designated place at all reasonable times during the offer period. A failure to make them available makes the vendor strictly liable.

There are prohibitions on the persons who may prepare the report, such as a family member of the vendor or the vendor's Solicitor⁸. It is also an offence if the vendor does not attach all the required documents available to a prospective buyer⁹.

If the buyer is aware of an error or description of the property before completion of the contract, the buyer retains the option to rescind or complete and claim damages¹⁰. Aside from this obligation, there is no other legislative requirement to update information, excepting that a pest report cannot be later than 90 days old. The purchaser may rescind the contract up until completion if a required document has not been attached to the contract.

6 Section 18 Civil Law (Sale of Residential Property) Act 2003

7 Australian Standard AS 4349.1 (Inspection of Buildings – Pre Purchase Inspections – Residential Buildings and AS 4349.3 (Inspection of Buildings – Timber Pest Inspections)

8 Section 9(3) Civil Law (Sale of Residential Property) Act 2003 (ACT)

9 Section 11 Civil Law (Sale of Residential Property) Act 2003 (ACT)

10 Section 11 Civil Law (Sale of Residential Property) Act 2003 (ACT)

Review Limitations

It is noted that there is a lack of formal review mechanisms available to measure the performance of the 6 year old ACT conveyancing system.

However, enquiries made to the relevant administrator indicated that no litigation has ensued to date. It was also commented that there was no statistical evidence, such as an influx or spike of insurance claims made against inspectors carrying out the reports since the introduction of the conveyancing regime in the ACT jurisdiction.

Other Jurisdictions

As part of this review, the vendor disclosure regimes in other Australian States were also considered. With the exception of Tasmania, all other Australian states have adopted some form of vendor disclosure requirement. No jurisdiction has currently introduced requirements which are as extensive as the ACT.

The vendor disclosure provisions of several other states are briefly discussed in Annexure C.

PART 5: Summary of Recommendations

1. That before offering residential property for sale by auction a vendor must annex to the contract for sale a:
 - Pest Inspection Report; and
 - Building Inspection Report.
2. That pest and building inspection reports not be required to be annexed to a contract for sale where the land is to be sold otherwise than by auction (ie, by private treaty, expressions of interest or tender etc).
3. That the mandatory pest and building inspection reports must be prepared:
 - by a person having adequate Professional Indemnity insurance in the amount of at least \$5 million;
 - following a prescribed report model based on Australian Standards;
 - by a person not related to the vendor, the vendor's real estate agent or the vendor's solicitor.
4. That a vendor be required to supply with the contract a copy of all reports commissioned on the property within 90 days preceding the date the property was first marketed for sale or listed by the agent (whichever occurs first).
5. That the purchaser:
 - reimburse the vendor for the cost of the reports on settlement; and
 - will be entitled to rely on the reports, and have the same rights of recourse against the report writer, as if the purchaser had commissioned them.
6. That the New South Wales Government undertake a comprehensive public education campaign to educate to both sellers and buyers of the necessity for obtaining quality pre purchase inspection reports.

PART 6: Addressing the Recommendations

1. *That before offering residential property for sale by auction a vendor must annex to the contract for sale a:*
 - *Pest Inspection Report; and a*
 - *Building Inspection Report.*
2. *That pest and building inspection reports not be required to be annexed to a contract for sale where the land is to be sold otherwise than by auction (ie, by private treaty, expressions of interest or tender etc).*

There is currently no legislative obligation for a vendor to disclose latent or patent defects in a building. This means that a vendor, who is most likely to have knowledge of a property's defects, has no duty to disclose them.

Guiding principles

In determining whether or not to recommend inclusion of a particular document the following criteria was taken into account:

- The accessibility of the information;
- The cost to the vendor;
- Any corresponding cost saving to the purchaser;
- The reliability of the information; and
- The relevance of the information to the majority of purchasers.

Building Inspection Report

A building inspection report is a common report purchasers can commission before the purchase of a property. The content of the report will include 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, but may also be obtained during the cooling off period¹¹ 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 should consider obtaining an additional assessment of the property from a suitable specialist, particularly if the purchaser has concerns about a specific area of the building.

Pest Inspection Reports¹²

A pest inspection report involves a physical inspection of a property to report on the presence or absence of pests, with a specific focus on wood destroying pests such as termites. The presence of termites if left undisturbed can cause significant structural damage to a property. Advance knowledge of their presence will be a major factor influencing most purchasers' decision to buy a property and/or the price willing to be paid.

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 currently required for persons who only carry out inspections and issue reports.

However, it would be possible to require that a report can only be given by a licensed controller having specific experience or training. Most submissions tendered as part of the current review addressed the need for NSW to readdress mandatory licensing, or at least noted the benefit to consumers for consultants to rely on a licensed inspector.

Other Reports

Pest and Building inspection reports are just two of the wide array of reports that a prudent purchaser may choose to obtain depending on the nature of the property and the purchasers specific needs. A summary of these reports considered by the review is included in Annexure D.

Cost Savings

It has been observed that the percentage of buyers that obtain pre purchase reports on a property they consider purchasing may be anywhere between 50 – 60 per cent. There is also a concern that these figures may be in decline as the number of buyers forgoing the expense of obtaining these reports rises. This means that a significant number of buyers are proceeding to purchase without an intimate knowledge of a property's strengths and weaknesses, relying instead on their own assessment.

¹¹ If applicable, see s66T Conveyancing Act 1919

¹² It was gratefully acknowledged that the correction of the term 'pest inspection report' was noted by various submissions to be correctly referred to as a 'Timber Pest Inspection Report', being the term consistent with the Australian Standard. However, for ease of reference, this report will herein refer to a 'Timber Pest Inspection Report' as simply a 'pest inspection report' throughout this report.

Furthermore, without the advantage of advance knowledge of the nature of any faults in a property, the purchaser loses the bargaining power to negotiate a better price for the property taking into account any remedial work that may be needed. Unknown faults may cause a purchaser to pay an excessive price, given the nature of any faults, in addition to the costs of repair. Given the degree of difficulty and skill associated with detecting building issues this may be a reality for even the most discerning purchaser.

Rationale

Under the current vendor disclosure regime different rules apply to the sale of residential property by private treaty and by auction. Private treaty sales are subject to cooling off provisions of Divisions 8 of Part 4 of the Conveyancing Act, whilst auction sales are not. Unless a purchaser waives their cooling off rights a private treaty sale of residential property includes a 5 day cooling off period that commences when the contract is made. During the cooling off period the purchaser can opt out of the contract for any reason by forfeiting 0.25% of the purchase price.

This allows the purchaser to secure the property for 5 days, thereby mitigating the chances of being gazumped. During that time the purchaser can make their own enquiries and commission property inspection reports tailored to their individual needs, secure with the knowledge that they can avoid the contract if something detrimental is discovered. The submissions received support the view that the current regulatory regime works to provide a sufficient safeguard for purchasers buying via private treaty sale without over burdening the vendor.

Auction sales are different. For most purchasers they are highly charged financial and emotional events. Purchasers at times attend auctions on very short notice with minimal time to investigate. When a contract is signed following the fall of the hammer the purchaser is committed to the sale without the luxury of a cooling off period.

Purchasers exercising due diligence may commission a pest inspection and building inspection report prior to auction to assess whether the property meets their expectations. Other purchasers may rely on their own assessment of the property and forego the expense of obtaining these reports. Either way, each purchaser would benefit from a quality set of reports that will give the intending purchaser an expert's visual assessment of the property. Requiring the vendor to present these reports with the contract would save all intending bidders the costs expended in obtaining them.

The accessibility of reports with the contract will also provide time savings to the purchaser who may then be in a position to make an offer to purchase prior to auction and exchange quickly. Conversely, if the intending purchaser decides that the reports are not suitable for their requirements, their decision to not participate at auction would avert the time they would have expended in obtaining these reports. In either instance, the house hunting experience is quicker, cheaper and easier for purchasers intending to bid at auction.

Throughout the review, it was acknowledged that there is difficulty with prescribing time limitations for pre purchase reports. This is particularly because any time limit prescribed by regulation would be purely 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. To combat this, in the ACT, the time period suggesting the validity of the report is 90 days from the date of the inspection. Without further consultation with the building consultant industry, this review is unable to recommend a timeframe within which a report will be considered reliable.

Licensing Issues

Building inspection reports were rejected as a compulsory annexure in past reviews of the vendor disclosure regime 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 requirement that was later abolished following 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.

A recurring theme throughout the submissions tendered as part of this review expressed support for the reintroduction of mandatory licensing for building consultants.

The issue of regulation of the building consultant industry is currently being examined by the National Licensing Taskforce. The taskforce is an initiative of the Council of Australian Governments (COAG) which has developed a national licensing system aiming to remove licensing inconsistencies across Australian state and territory borders for select occupations. At the time of print, it was understood that the system will commence on 1 July 2012 with proposal to include building and building – related occupations. The scheme will be overseen by the newly formed National Occupational Licensing Authority.

Thus, this review makes no recommendations with regard to the issue of licensing. Having perused the Decision Regulatory Impact Statement for the National Licensing System for Selected Occupations¹³, and noting the ratifying Act being the *Occupational Licensing (Adoption of National Law) Act 2010*, it is noted that these issues will be reviewed in greater depth than is feasible within the scope of the current review.

3. *That the mandatory pest and building inspection reports must be prepared:*

- *following a prescribed report model based on Australian Standards;*
- *by a person having current Professional Indemnity insurance in the amount of at least \$5 million;*
- *by a person not related to the vendor, the vendor's real estate agent or the vendor's solicitor or licensed conveyancer.*

Most submissions received from the building consultancy industry stressed the importance of obtaining quality pre purchase reports. It is well acknowledged that quality issues are relevant.

Professional Indemnity Insurance

Insurance is another factor lending credibility to any system requiring mandatory reports. In the ACT, both pest and building inspectors are required to hold professional indemnity insurance with a minimum limit of \$500,000¹⁴.

Given the reliance that purchasers place on the content of a pest inspection or building inspection report, it is recommended that a requirement for mandatory insurance should be similarly adopted in NSW. In view of differences in the median value of housing, (currently reported to be in excess of \$600,000 in the Sydney metropolitan area) and in repair costs it is recommended that the amount of professional indemnity insurance be set at a minimum of \$5 million dollars.

The Quality of Reports

It is acknowledged that across the building consultancy industry, like any other industry, variations between consultants exist for obvious reasons of skill, experience and work ethic. To ensure that an appropriate standard of report is provided it is recommended that the form of the reports be prescribed by Regulation and be made to comply with their respective Australian Standards, being Australian Standard AS 4349.1 (Inspection of Buildings – Pre Purchase Inspections – Residential Buildings) and AS 4349.3 (Inspection of Buildings – Timber Pest Inspections).

Mandatory compliance with the Australian Standard ensures consistency, uniformity and instils relevance in content delivered in a form that can usefully benefit purchasers.

Independence

'The purchase of residential property is an important decision and should be supported by knowledge of the physical state of the property. Independent and objective advice is often required to enable informed decisions.'^{14'}

Inspector independence was an issue also recognised by Archicentre Limited in their submission to the current review, where it was noted:

'Property buyers must be able to rely upon the advice provided by a vendor. Advice provided in the interests of either the vendor or the inspector will generate little if any consumer benefit and could potentially result in financial loss and/or injury to the purchaser and reputational damage for the government. This situation is clearly worse than having no mandatory reporting environment at all due to the moral hazard inherent in a legislated consumer protection environment.'

Whilst it is acknowledged that there is little that the government can do to regulate independence it is important that some rules be introduced to encourage impartiality by preventing a vendor from obtaining reports from inspectors having a close relationship to the vendor, real estate agent or Solicitor/Licensed Conveyancer.

13 http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/National_Licensing_System_RIS.pdf

14 Australian Standard AS 4943.1, Inspection of Buildings, Pre – purchase Inspections – Residential Buildings, Foreword Page 5.

4. That, a vendor be required to supply with the contract a copy of all reports commissioned on the property within 90 days of the date the property was first marketed for sale or listed by the agent (whichever occurs first).

An issue that was identified during the review was the possibility that a vendor could commission several reports before selecting the report that will be attached to the contract, as a vendor's objective will 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. In the ACT, section 9 (1)(h) (iii) attempts to overcome this practice by requiring a seller to supply all reports that have been commissioned on the property within the period of 90 days before the property was first marketed for sale.

The ACT system of pest and building reports is one that revolves around a central registration system, administered by the Australian Capital Territory Planning and Land Authority. Under this regime, inspectors are required to report the details of every inspection prepared and a record of the inspection becomes part of the public record. In NSW, there is no registry that allows purchasers, or the public at large, to verify building defects and other quality issues associated with residential or commercial buildings. The absence of such a registry will not prevent the introduction of a legislative provision requiring the vendor to produce all reports commissioned within a set period before a residential property is marketed for sale. Such a provision will act as a disincentive for a vendor to shop around for reports and will help instil confidence in a mandatory reporting regime.

5. That the purchaser:

- reimburse the vendor for the cost of the reports on settlement;
- will be entitled to rely on the reports, and have the same rights of recourse against the report writer, as if the purchaser had commissioned them.

The current vendor disclosure regime already imposes a considerable burden on the vendor, both in time and cost. The vendor is required to obtain a zoning certificate, a sewer diagram and a variety of instruments relating to the title, the cost of which can mount up. It is important to ensure that any new regulation will not impose an unreasonable extra burden on vendors, particularly given the fact that pre purchase reports are obtained for the use of the purchaser and will provide little benefit to the vendor. Where a vendor obtains multiple reports, the purchaser should be liable to pay for only one report, being the cheapest.

Vendor's Right of Reimbursement

In the ACT, the vendor has a legislative right of reimbursement for the costs incurred in supplying the purchaser with a pest and building report.

In practical terms the costs are deducted from the sale price at settlement by the ultimate purchaser.

Section 18 of the Act is duplicated below for ease of reference:

Buyer to reimburse seller for cost of certain reports

(1) On completion of a contract for the sale of residential property, the seller is entitled to reimbursement from the buyer for the cost of obtaining the following reports for the contract:

(a) a building and compliance inspection report required under section 9 (1) (h) (iii) (or, if the seller obtained more than 1 report, the latest report);

(b) a pest inspection report required under section 9 (1) (h) (iv)

(or, if the seller obtained more than 1 report, the latest report).

(2) In this section: "cost", of a report, does not include any amount paid for an additional service in relation to the report.

Example

A seller pays an amount additional to the ordinary cost of obtaining an inspection report to obtain the report within a shorter than usual period. The buyer is not liable to reimburse the seller the additional amount.

It is recommended that a similar provision be introduced requiring the purchaser to reimburse the vendor for one building inspection report and one pest inspection report.

Privity of Contract

Currently, a NSW 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 an error or omission in the report. This is because the vendor and the inspector are the parties to the contract under which the report is prepared. The doctrine of privity of contract prevents the purchaser from relying on the contract to sue the inspector directly. However, under the law of tort, it could be argued that the report author has a duty of care to the purchaser as it would be reasonably foreseeable that the purchaser would rely on the report.

In the ACT, section 19 of the Civil Law (Sale of Residential Property) Act 2003 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. It is recommended that any statutory regime requiring the vendor to provide pre – purchase reports should include a similar provision enabling a purchaser to sue the report writer.

It is recommended that section 19 of the *Civil Law (Sale of Residential Property) Act 2003* which is set out in full below, be adopted in NSW:

'Compensation to buyer for false report etc

(1) *This section applies if—*

- (a) *a person buys residential property under a contract; and*
- (b) *a statement or report mentioned in section 9 (1) (h) (ii), (iii) or (iv) is made available to the buyer; and*
- (c) *the statement or report is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care; and*
- (d) *because of that, the buyer incurs loss or expense.*

(2) *The person who prepared the statement or report is liable to compensate the buyer for the loss or expense.'*

- 6. *That the New South Wales Government undertake a comprehensive public education campaign to educate to both sellers and buyers of the necessity for obtaining quality pre purchase inspection reports.*

The Necessity of a Quality Report

Inspectors in the ACT are required to have a valid professional Indemnity Insurance policy, they need not possess minimal technical qualifications or experience. Submissions tendered as part of this review observed the need for a quality report as paramount.

This requirement was articulated in a submission tendered as part of the review¹⁵:

'A good pre purchase building or pest inspection (even if just visual) can, and usually does, identify the cause or nature of serious building or pest problems affecting a property. If not, it at least identifies where there is a substantial likelihood or risk of such problems warranting further investigation. This is because, in my experience, a good inspector can usually diagnose, even from a careful visual inspection, critical (if any) underlying substantial problems with a home.'

Another submission observed that '*[c]onsumers naively assume that all traders are suitably qualified and skilled'*¹⁶.

Given that the majority of purchasers and sales of residential property in NSW are predominately one – off transactions for most parties, it is essential that the person commissioning the pre purchase reports is made aware of, or seeks information about, the inspector carrying out the inspection. Information the purchaser should be seeking relates to licences and the experience of an inspector and other qualifications he or she may possess, in addition to the insurance policy details.

This review has demonstrated the importance of quality reports and recommends that the NSW Government support an education campaign to inform purchasers of the benefit of obtaining these reports, prior to committing to purchase property. It is important that purchasers similarly appreciate the utility of a good report.

15 Keith Ross Hewlett, Solicitor.

16 The Institute of Building Consultants, NSW

ANNEXURE A

Public Forum 15 September 2010

On 15 September 2010 a public forum was convened at Parliament House, NSW as a part of this review.

The public forum was held as an opportunity to facilitate an open dialogue between specialist industries and other stakeholders. The forum opened with brief presentations from a select panel of representatives who expressed perspectives from their respective industries.

The specialist panel consisted of the following individuals:

Mary Macken, President, Law Society NSW and Chair Property Law Committee

Wayne Stewart, President, Real Estate Institute, NSW

John Symond, Executive Chairman, Aussie Home Loans

Alan West, Chief Executive Officer, Australian Institute of Conveyancers

Patrick Bright, Director, EPS Property Search

Eric Shilson – Josling, Secretary, Institute of Building Consultants

Chris Batt, Director, Department of Justice, Tasmania

The forum was also attended by the following individuals, whose contribution is greatly appreciated:

Michael Ferrier – EyeOn

Scott Murray – Boxall Surveyors

Gavin Childs – Childs Property Reports

Dominic Ogburn – Access Property Services

Diane Boyd – Champion Legal

Gilbert B de Chalain – Urban Taskforce

William Ryan – Veda Advantage

Stephen Ryan – Veda Advantage

Keith Hewlett – Keith Hewlett Solicitor

Peter Meredith – Master Builders Association NSW

Liza Booth – Law Society NSW

Andrew Wilson – Law Society NSW

Shane Clarke – Australian Environmental Pest Management Association

Graham Thorpe – Exceptional Building Services

Ray Brylynski – Exceptional Building Services

David Ngui – Building Consultant

Anthony Capaldi – APOPA

Tony Cahill

Sharlene Cohen – Property Works

Angus Kell – Archicentre

Geoff Sweetland – Sydney Property Inspections

Roy Mock – Aminga Holdings, Building Sustainability Consultants

Peter Ronis – Shanahans Solicitors

Michael Preston – Home Sustainability Assessor

Philli Sim – Australian Building Services

Graham Hellier – Rapid Solutions Pty Ltd

Dale Turner – Australian Institute of Conveyancers NSW

Gary Byrne – Rapid Solutions Pty Ltd

Blair Moore – Safe House Property Consultants
Shawn Moore – Safe House Property Consultants
John Moore – Safe House Property Consultants
Neil Pragnell – Turtons

ANNEXURE B

Submissions Acknowledged

Contributions were gratefully received from the following recipients:

Ben Quach
Peter Meredith, Master Builder's Association
Terry Howard
Paul Easton
Rob Sands, Coastline Building Inspections
Ed Wilson
Brad Scott
Peter Cain
Leanne Ward
Dominic Ogburn, Access Property Services
Gail Simpson, Pergola Trends
George Rousos, Industry Training Consultants
Kevin & Katsuko McMullen
Bob Graham
Gavin Williamson
Les Klekner, Tuggeranong Legal
John Henshaw, Marsdens
Cheryl Lopresti, Maroubra Legal
Simon Visser, S & E Visser Pty Ltd
Scott Murray, Institution of Surveyors
Merrill Phillips, Equity Conveyancing
Paul Brown, McDonald & Partners
Don Ayres, Cooranbong First National Real Estate
Wayne Flynn, Buildcon Services
Mike Dean, Building Inspection Company
Robert Taylor, Newcastle Building Consultancy Group
Geoff Sweetland, Sydney Property Inspections
Sally Nash, Sally Nash and Co
Stephen Koelewyn, Ausinspect
Gary Wood, Mirvac Homes NSW
John Bacchus, Bacchus Partners Building Consultants
Peter Haikalis
Tracey Redden, MJ Duffy and Son Solicitors
Patrick Bright, EPS Property Search
Peter W Finch
Howard Ryan and Chris Whitelaw, Australian Property Owners Protection Association
Gary Byrne, Rapid Solutions
Peter Meredith, Master Builders Association

Stephen Ware, Australian Environmental Pest Managers Association

Michael Ferrier, EyeOn Property Reports

Tom Galletta, Solicitor and Notary

Andrew Connor, Illawarra Building Appraisal Services

Carlos Gonzales

Nathan Hogan, Hogan Property Inspections

Alan West, Australian Institute of Conveyancers

Tim McKibbin, Real Estate Institute, NSW

Ian Gilbert, Australian Banker's Association

Eric Shilson-Josling, Institute of Building Consultants

Aaron Gadiel, Urban Taskforce Australia

Steve Raftis

Mary Macken, Law Society of NSW

Mark Stewart, Archicentre

David Parken, Australian Institute of Architects

Arlene Barnett, Property Transfer Professionals

Warwick Macgregor, Practising Building Consultant

Roz Vanderzwet

Keith Hewlett, Keith Hewlett Solicitor

Michael Simons, Hunter Building Inspections

3 submissions received in confidence

ANNEXURE C

Other Jurisdictions Victoria

Victoria operates under a vendor disclosure regime with no statutory warranties. Prior to exchange, various details are required to be disclosed by the vendor which include a combination of comprehensive title and quality matters, pursuant to section 32 of the *Sale of Land Act 1962*.

Under this section the vendor is required to disclose the following particulars:

- *for land to which a residence is erected, any building permits within the last 7 years with respect to any building on the land;*
- *the particulars of any mortgage not to be discharged before the purchaser becomes entitled to possession or to rents and profits;*
- *the particulars of any charge;*
- *a description of any easement, covenant or restriction affecting the land;*
- *details of any planning instruments and the zoning of the land and a warning concerning permitted use*
- *details of any rates and taxes charged on the land;*
- *particulars of any notices, order declarations, reports or recommendations of a public authority or government department for an approved proposal affecting the land of which the vendor might reasonably be expected to have knowledge, including notices of intention to acquire;*
- *basic information regarding services relating to gas, electricity, water, sewerage and telephone.*
- *a statement if there is no road access to the property;*
- *particulars of any current land use restriction notice as a result of contamination;*
- *a copy of the certificate of title or other evidence of title to the land; if the vendor is not the registered proprietor or owner, evidence of their right or power to sell; and*
- *if the land is subject to a subdivision, certain information must be disclosed concerning the subdivision.*

Where a vendor supplies false information, or fails to supply all the information required, the purchaser may rescind the contract entered into on the basis of that information at any point before completion.

However, the purchaser may not rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if the relevant disclosure had been made. The burden of proof lies with the vendor.

South Australia

This state has a similar disclosure onus on the vendor to disclose as the Victorian model in that a vendor disclosure statement is required to be attached to the contract for sale. Under this regime, the seller is required at least 10 days before completion of the contract to serve on the buyer a prescribed form detailing both title and quality issues, known as a Vendor's Statement, Form 1. The SA model prescribing further details as it extends to any matter affecting the enjoyment of land: section 7, *Land and Business (Sale and Conveyancing) Act 1994 (SA)*.

The Vendor's Statement, Form 1 is prescribed in the Land and Business (Sale and Conveyancing) Regulation 2010 and requires details of the particulars of any matters regarding title, enjoyment of the land, the presence of asbestos, pollution and contamination issues.

If the vendor makes a defective statement which prejudices the purchaser, the purchaser may apply to the court for a declaration declaring the contract void or an order for damages that the courts considers just in the circumstances.

Failing to comply is a criminal offence, with a maximum penalty of \$2,500. Defenses are available, including that the contravention was unintentional and not negligent, or that the vendor was entitled to rely on another person or the purchaser waived compliance after obtaining legal advice on the issue. The act also specifies that it does not affect the existence of any other civil remedies.

The relevant information is presented as answers to questions in the prescribed vendor form. This information will comprise, on behalf of the vendor, a contractual commitment that the information is true and accurate.

Other Jurisdictions to Note

Northern Territory

The Northern Territory will soon introduce into law a new vendor disclosure regime with the introduction of their *Sale of Land (Rights and Duties of Parties) Act 2009*.

This law provides that a vendor make available for inspection a draft contract for sale in addition to various disclosure documents including a copy of the latest rates notice and a building inspection report. A distinction should be made here that a pest report will not be made a required document.

It was advised by the Northern Territory Department of Justice that the proposal to mandate a pest report into the vendor disclosure regime was considered but not ratified because of the issues the territory faces with the scarcity of available qualified pest inspectors in certain areas, thus having an impact on the jurisdiction's ability to enforce regulation.

Tasmania

As a result of the findings of the Tasmanian Law Institute's Issues Paper 2004 into vendor disclosure, the Tasmanian government is proposing to initiate its new vendor disclosure regime. It is unclear when the vendor disclosure regime will operate, although it was advised that in late 2010 the new system would be operable. The forthcoming Tasmanian regime places a stronger emphasis on real estate agents to relay information to prospective purchasers.

ANNEXURE D

Other reports considered as part of this review included:

Asbestos Report

There has been concern expressed about the possibility that a building may contain asbestos and a suggestion had been made that some form of asbestos report should be made a prescribed document. It was also considered that the presence or absence of asbestos was more of a building issue than a conveyancing issue that was more properly dealt with at the time a building was being renovated or demolished, not when a property was being sold. Consequently, no recommendations will be made for such a report to be made a prescribed document.

Strata Reports

A strata report, is a type of report undertaken by a solicitor or licensed Conveyancer, where the records of the strata scheme will be analysed. The content disclosed in a strata report will usually provide information on the funds, levies, insurance, any previous or pending litigation, building alterations, maintenance, and occasionally any social problems within the scheme. Upon my investigations most property practitioners usually encourage their clients to obtain a strata report, generally costing anywhere between \$300-\$350 per search.

At present, there is no legislative guidance as to what a strata report is, what it should contain or who may perform it for a fee. Rather, the content of a strata report will depend on the person performing the search, as well as the documents that are available at the time the report was undertaken. There is currently no Australian Standard to which a specific strata report would apply. This current lack of regulation makes prescribing a mandatory strata report too uncertain and thus unfeasible. It is recommended that the themes relating to the compulsory annexure of a strata report will be re-examined if Australian Standards are developed for them.

Energy Efficiency Reports

The ACT, as of 1 July 2004, regulated energy efficiency assessors, whom were previously unlicensed and unregulated, being bound only to a code of conduct. The regulation was aimed to protect consumers and to add confidence to the mandatory energy rating scheme and extends the requirement of compliance to rental properties. If in the future an energy efficiency report is to become a mandatory attachment to a contract of sale, it is recommended that NSW follow a similar system of regulating this profession and the content of this style of report.

Residential Building Mandatory Disclosure

In 2009, the Council of Australian Governments (COAG) published a National Strategy on Energy Efficiency. It has been suggested that a Residential Building Mandatory Disclosure regime be introduced to require owners and landlords to disclose the energy efficiency, greenhouse gas impact and water efficiency of residential buildings at the time the property is marketed for sale or lease. If implemented, the proposal would require an owner or a landlord to disclose the property's energy efficiency using a prescribed home energy rating system.

The proposal suggests that a 'Certificate' be attached to the contract for the sale or lease as a prescribed document. More information on the nature and scope of the Residential Building Mandatory Disclosure will be available from the Australian Government's Department of Climate Change and Energy Efficiency upon release of a Regulatory Impact Statement. At the time of print it was understood that the Department of Climate Change had commissioned the Construction and Property Services Industry Skills Council to undertake a scoping study on the training requirements of assessors.

It is noted that it is outside the scope of this report to comment on the feasibility of such a proposal without further details of the proposed regime, or details on the effect on conveyancing practice.

Broadband Accessibility

The availability of broadband access was considered during this review. The issue stems from the development of new buildings, in areas where broadband access are either underdeveloped or inadequate. The problem seemingly stems from purchasers assuming that internet connection at their desired speed would be readily available at their location. The question arose as to whether the vendor should be supplying details of the adequacy of internet connectivity with respect to the property for sale.

Due to the varying frequencies and signals in which different internet service providers can deliver to their customers, particularly across country NSW, there is practical difficulty in requiring a vendor to disclose the level of sufficient internet access on a particular property. Thus, it is concluded that this matter should be left with the purchaser, who is in a better position to make relevant enquiries with regard to their own circumstances.

Survey

Prior to the remake of the Conveyancing (Sale of Land) Regulation 2010 on 1 September 2010, the issue of whether a survey should be made a prescribed document was investigated by the Conveyancing (Sale of Land) Regulation Review Committee 2010.

The following excerpt was provided in the June 2010 Regulatory Impact Statement¹⁷:

'Clause 1 of Schedule 2 of the existing Conveyancing (Sale of Land) Regulation 2005 provides sufficient protection to purchasers by deeming inclusion of a mandatory clause dealing with potential encroachments. That clause (which is reproduced without changes in the draft Regulation) provides that every contract is deemed to include a term which says that a vendor cannot prevent a purchaser from making an objection, requisition or claim for compensation, after exchange of contracts, to any encroachment by a building or structure onto the land being sold, or from the land being sold onto adjoining land, unless the encroachment is disclosed in the contract.'

The implied term enables a purchaser to obtain an identification survey after exchange of contracts if desired and provides a remedy against a vendor should an encroachment be discovered. In view of this, the additional costs that would be imposed by making identification surveys compulsory cannot be justified.'

It is not recommended that a survey be made a compulsory part of the contract of sale.

ANNEXURE E: Observations

Alternative Vendor Disclosure Regimes: Vendor Statement

Various mandatory vendor statements currently operating in Victoria and Queensland were examined briefly during this review. In practice, this regime requires the vendor to vouch for the condition of various aspects of a property by completing a vendor statement that forms part of the contract of sale. It was noted that Tasmania is currently in the final stages of implementing their vendor disclosure statements.

Given that a number of jurisdictions have adopted some form of vendor disclosure document rather than a mandatory annexure of pre-purchase reports, this review broached upon the viability of the operability a similar regime in NSW. However, this option was not considered viable due to the uncertainty in answers to the following questions:

- What if the vendor cannot vouch for the condition of the property, ie investors, trustee and mortgagee sales?
- What requirements would compel the vendor to supply the most current information that can be best tested by the purchaser?
- What are the purchaser's appropriate rights and remedies if a statement was inaccurate or incomplete?

The conclusion in assessing a possible vendor disclosure document was not considered necessary as the documents currently prescribed under the Conveyancing (Sale of Land) Regulation 2010 already require the disclosure of certain title matters. It was considered that quality matters, that generally are not required to be disclosed, can be better addressed by disclosure in pre-purchase reports by an independent party not forming part of the sales transaction.

Tailored Services

It was noted that some building and pest inspection companies provide extensive services with regard to pre purchase reports aimed at minimising costs for the consumer. For illustrative purposes for example, if there is more than one party interested in the same property, the costs of preparing the reports be apportioned where the same company has been contracted to prepare the reports. Another company observed during the review offered rebates to the value of \$200 for the cost of preparing the reports where a sale of the inspected property did not take place for that instructing client. However, these are commercial matters that individual businesses can present to the market place.

17 http://www.lpma.nsw.gov.au/about_us/publications/exhibition/discussion_papers/?a=131046

ANNEXURE F

Works Consulted:

1. 'Reality Check, A Real Estate Guide for Buyers and Sellers in the ACT': http://www.ors.act.gov.au/fairtrading/pdfs/Industries/Guides/REALiTY_Check.pdf
2. The Property Agents and Land Transactions Bill 2005 Vendor Disclosure and Cooling Off An introduction for Conveyancers: <http://www.taslawsociety.asn.au/news/DisclosurePaper.pdf>
3. Tasmania Law Reform Institute, Vendor Disclosure, Final Report Number 5, September 2004: http://www.law.utas.edu.au/reform/docs/VendDisFinRep200904_A4.pdf
4. Tasmania Law Reform Institute, Vendor Disclosure, Final Report Number 6, June 2004: <http://www.law.utas.edu.au/reform/docs/VendDiscJune15A4.pdf>
5. Australian Standard 4943.1-2007, Inspection of Buildings, Pre-purchase Inspections- Residential Buildings, Standards Australia
6. Australian Standard 4349.3-2010, Inspection of Buildings- Timber Pest Inspections, Standards Australia
7. National Licensing System for Specified Occupations, Decision Regulation Impact Statement: http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/National_Licensing_System_RIS.pdf
8. S Christensen, WD Duncan, A Stickley, 'Evaluating Information Disclosure to Buyers of Real Estate- Useful or Merely Adding to the Confusion and Expense' Vol 7, No 2 (QUTLJJ)

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Further comment

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