

Mr Robert Goncalves
Senior Solicitor
Legal Services Division
Land and Property Information
Department of Finance, Services and Innovation

10 September 2015

By email: robert.goncalves@lpi.nsw.gov.au

Dear Mr Goncalves,

REINSW Submission
Draft Discussion Paper – Review of the Conveyancing (Sale of Land) Regulation

The Real Estate Institute of New South Wales (**REINSW** or the **Institute**) appreciates the opportunity to contribute to the review of the *Conveyancing (Sale of Land) Regulation 2010* (**Regulation**) and to provide comments in relation to the contents of the draft Discussion Paper (**Discussion Paper**).

The Institute is the largest professional association of real estate agents and other property professionals in New South Wales. The REINSW seeks to promote the interest of members and the property sector on property related issues. In doing so the REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW welcomes discussion of the issues raised in this submission with the legal and policy officers at the department of Land and Property Information (**LPI**).

General

In the interests of consumer protection there are certain things that a prudent purchaser should do as part of their enquiries. If these matters are prescribed for inclusion in the contract, then this ensures that they have been brought to the purchaser's attention.

Stigmatised properties (material fact)

Traditionally there have been two lines of enquiry for purchasers of real property:

- the quality of the title, which can be ascertained by a search of the register at LPI; and
- the quality of the structures, which to an extent can be ascertained through a building report and other similar reports.

In recent years, the question of whether a property is “stigmatised” has become increasingly relevant. Section 52(1) of the *Property, Stock and Business Agents Act 2002 (PSBA)* states:

*A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a **material fact** (whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act. (bold emphasis added)*

An agent has a duty to act in the best interests of the vendor. The agent also has an obligation to disclose to a purchaser any stigma or “material fact” pertaining to the property. There is no corresponding obligation on the vendor.

Imposing these disclosure obligations only on the agent results in several concerning, but probably unintended, consequences:

- the intent of ensuring consumer protection is not met, as there is no obligation on the vendor to inform the agent or the purchaser of any stigma associated with the property;
- it is not in the interest of the vendor to make these disclosures as the price purchasers are willing to pay may be adversely affected;
- it creates a tension in the relationship between the vendor and the agent;
- there is conflict between the consumer protection obligation in the PSBA and the disclosure obligations of the vendor, which are not consistent with the agent’s;
- the agent may become liable for non-disclosure in instances where the vendor has not made the agent aware of those matters in the first place.

For example, an agent acting in the best interest of a vendor in the sale of a stigmatised property may in all the circumstances advise the vendor to conduct the sale themselves. It is submitted this is repugnant to the interests of consumer protection.

Matters that could possibly be considered to stigmatise a property range from a murder or violent crime having taken place on the property to the presence of asbestos or other latent or safety defects, through to matters relating to cultural or religious beliefs.

It is submitted that in the interest of consumer protection the following should be addressed in the new Regulation:

1. To ensure consistency for purchasers there needs to be a disclosure obligation on the vendor corresponding to the obligations on the agent under the PSBA.
2. To ensure clarity for agents and vendors, the concept of what comprises a “stigmatised property” needs to be clearly defined in the legislation.
3. To ensure certainty of disclosure, the vendor’s disclosure obligations need to be contained in the contract.

Asbestos

We note your comments that the section on asbestos has been removed from the Discussion Paper as the outcome of the Loose Fill Asbestos Taskforce is still pending.

It is submitted that loose-fill asbestos, although known as the most dangerous, is only one type of hazard associated with asbestos. As mentioned above, the presence of asbestos could be considered to be a stigma in relation to a property. In addition, some asbestos issues may be latent defects in a property.

It is submitted that there needs to be a mechanism to put prospective purchasers on notice of the presence of asbestos in a property. To achieve this, a mandatory asbestos report prepared by a licenced asbestos inspector setting out the location of asbestos and a management plan, should be attached to the contract for sale.

Strata certificate

The Institute is of the view that, in addition to a strata inspection certificate, a certificate pursuant to section 109 of the *Strata Schemes Management Act* 1996 should be attached to the contract. This way purchasers will be put on notice upfront about the costs associated with the strata lot they are considering purchasing, including any existing special levies.

Planning certificate

It is submitted that the certificate pursuant to section 149(5) of the *Environmental Planning and Assessment Act* 1979 should also be a prescribed attachment to the contract. In practice purchaser's lawyers and conveyancers obtain this certificate after exchange.

Building and pest reports

The draft Discussion Paper recognises that frequently there is duplication and additional expenses incurred by prospective purchasers in obtaining building and pest reports for a property and then being unsuccessful, and that purchasers are understandably upset at having incurred the expense and missing out on the property.

It is submitted that, to ensure economy, convenience and reliability for purchasers and vendors the following matters should be legislated:

1. The building report should be one of the prescribed documents.
2. There should be a requirement for building inspectors to be licenced, with an obligation that inspectors act impartially and there should be a prescribed set of qualifications.
3. There should be a legislated mechanism whereby the purchaser can have a right of recourse against the building inspector in respect of the contents of the report, even though the vendor commissioned the report.
4. Building reports should be standardised with a prescribed list of matters to be addressed, including:
 - asbestos;
 - glass safety;

- window safety locks;
- smoke alarm compliance;
- safety and structural integrity of decks and balconies;
- the presence of lead paint;
- electrical installations;
- swimming pool compliance;
- blind cord safety;
- other hazards located on the property.

The above list comprises the matters which a property manager (with no building expertise) is required to address when managing and leasing a property. It is submitted that this falls more appropriately in the domain of the building inspector.

In addition, prescribing the areas which a building report must cover ensures that the building inspector turns their attention to the relevant issues and that the parties have a better understanding of the contents of the report.

Comments on Discussion Paper

1. On page 4, under the heading of “Objectives of the Regulation”:

In the third paragraph, after the first sentence, please add a sentence to the effect that a vendor is not required to disclose latent defects in the building or any stigma attached to the property.

In the fifth paragraph, where it states that there has been relatively little litigation, it would be useful to add some information and statistics to illustrate how much litigation there has been and how it compares to other areas of law.

Under the “Issues for Discussion” heading, please add the following questions:

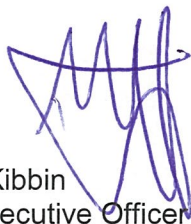
- *Should there be an obligation on the vendor to disclose latent defects in the building (as well as defects in title)?*
- *Should there be an obligation on the vendor to disclose the existence of any stigma associated with the property?*

2. On page 5, in the fourth bullet point under the “Prescribed documents” heading there is a typographical error – “sale of fall through” should read “sale to fall through”.
3. On page 6, in the paragraphs listing the suggested additional documents, an additional paragraph “D. Asbestos Report” should be added.
4. On page 6, under the heading “Pest and Building Inspection Reports”, in the second paragraph it should be clarified that pest reports identify other pest activity in addition to termites. Also, the discussion should mention that currently pest and building reports commonly contain extensive disclaimers which reduce their usefulness and reliability. This reinforces the need for building inspectors to be appropriately qualified and regulated.

5. On page 8, under the “Issues for Discussion” heading, please add the following questions:
 - *Should building inspectors be regulated and subject to a minimum set of qualifications?*
 - *Should various compliance matters (for example, window locks, balcony safety, blind cord compliance) be included as mandatory matters to be covered in building reports?*
 - *Should the contents of the building reports be prescribed and standardised?*
 - *Should there be prescribed warranties by the vendor as to compliance with safety and building matters (for example, window locks, balcony safety, blind cord compliance, swimming pools)?*
6. Page 9, under the “Issues for Discussion” heading, there should be some discussion about the role of the certificate under section 109 of the *Strata Schemes Management Act 1996*. Please also add the following question:
 - *Should the certificate pursuant to section 109 of the Strata Schemes Management Act 1996 be a prescribed document?*
7. Page 14, in the first paragraph under the heading “The need for specific disclosure in off-the-plan sales”, the last part of the first sentence should include the word “not” so it reads “...or the strata building has not yet been built”.
8. Page 14, in relation to swimming pool certificates, it should be considered whether the mechanism should be similar to the off-the-plan sales, i.e. the purchaser is not required to complete until 14 days after the swimming pool certificate has been issued.

The REINSW appreciates the opportunity to provide this submission and welcomes discussion of the issues raised with the legal and policy officers at the department of Land and Property Information.

Yours faithfully,



Tim McKibbin
Chief Executive Officer
The Real Estate Institute of NSW