

REVIEW OF VENDOR DISCLOSURE FOR RESIDENTIAL PROPERTY SALES IN NSW BY MATT BROWN, MP DISCUSSION PAPER



Land and Property Management Authority



**Closing date for submissions
Wednesday 1 September 2010**

Introduction

The Minister for Lands has supported a review of the vendor disclosure requirements so far as they relate to pre-purchase reports, including but not limited to building and pest inspection reports. The review will consider the viability of requiring a vendor to provide certain pre purchase reports with the contract for sale of land to enable a purchaser to be better informed about the condition of a property before contracting to buy it.

This paper is intended to prompt discussion on the issue. It outlines the current vendor disclosure requirements and identifies some of the costs and benefits of requiring a vendor to provide pre purchase reports. The review will consider whether requiring pre purchase reports with the contract for sale of land would simplify the process or add further complexity to it. At the conclusion of the review, a Report will be prepared by Matt Brown MP, Member for Kiama with secretariat support from the Land and Property Management Authority (LPMA) for Cabinet's consideration.

Your written views on these issues are welcomed. Please refer to the conclusion of this paper for information on how to make a submission.

Current situation

In NSW, a vendor must include certain prescribed documents in a contract for the sale of land. The prescribed documents that must be annexed to the contract for sale include a title search, sewerage diagram, section 149 certificate and a copy of the relevant plan, amongst other things. Pre purchaser reports are not required to be annexed. Currently, the 'prescribed documents' do not require the production of any pre-purchase reports. Purchasers wanting to satisfy themselves as to the physical condition of the property will commission their own pre purchase report.

Throughout this document, building inspection reports and pest inspection reports will be referred to collectively as 'pre-purchase reports'.

The cost of pre-purchase reports is typically \$500 in total for each property, depending on the nature of the report requested. This report is 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.

In the Australian Capital Territory (ACT), a different approach is undertaken. A vendor is required by statute to provide pre-purchase reports to potential purchasers. The pre purchase reports that are required by the ACT legislation include:

1. A building and compliance inspection report
2. A pest inspection report if the building has been occupied
3. Energy efficiency rating statement and an asbestos report/advice.

The reports are included as an annexure within the standard contract of sale. Upon completion of the contract, the purchaser reimburses the vendor for the cost of the reports. The Regulation governing this process standardises the minimum content of these reports and all inspections must be consistent with Australian Standards. An intent of the ACT regime is to overcome the difficulty and expense associated with potential purchasers each having to commission their own pre-purchase reports.

The proposed review is intended to assess the costs and benefits of adopting a system in NSW where a vendor would be required to provide a pre purchase report to potential purchasers. The review will aim to maintain the conveyancing objective of balancing what a vendor must disclose with what a buyer can reasonably confirm through their own enquiries.

Proposal

It is proposed to investigate the practical and legislative aspects of stipulating that pre-purchase reports (including building inspection and pest inspection reports) must be provided by vendors to potential purchasers prior to auction or sale by private treaty of real property in NSW.

The terms of reference of the review are:

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.

Statutory instruments to be considered as part of the report

Real Property Act 1900

Conveyancing Act 1919

Conveyancing (Sale of Land Regulation) 2005

What is a building inspection report?

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

A building inspection report should include enough information for the purchaser to be aware of the property's condition and identify any significant problems.

However, a standard building inspection report is generally a visual inspection only and may not identify major structural defects or other hidden problems. If a buyer has concerns about specific problems, he/she might consider obtaining an additional assessment of the property from a suitable specialist.

What is a 'pest inspection report'?

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.

Why get a building inspection report and a pest inspection report?

There are good reasons why a purchaser should obtain pre purchase reports before purchasing a property. The buyer will have advance knowledge of the nature of any problems with the intended property and better negotiate a price for the property which properly allows for identified repairs or other remedial work.

In order for us to prepare the report, your views are sought with regard to the following proposals.

Should a vendor be required to provide pre-purchase reports to potential purchasers?

Issues in favour

Costs

The proposal in favour of including pre-purchase inspection reports as prescribed documents in a contract for the sale of land is mainly driven toward reducing costs for the potential purchaser. A purchaser looking to buy land may wish to make inquiries as to the condition of the property, usually by commissioning a pest and building report. Where many purchasers are interested in a property multiple reports may be made on the same property, particularly in the case of Auction. It may be the case that a prospective purchaser obtains several reports on interested properties before being the winning bidder at Auction. By requiring the vendor to obtain the report and have the reports available with the contract means that potential purchasers have access to at least one set of pre-purchase inspection reports available on the property, without the need to pay for them upfront.

Issues against

Vendor commissions several reports

The vendor's motivation for obtaining a pre purchase report will be different to that of a purchaser. To obtain a better sale price a vendor may be tempted to shop around for a report that shows the property in the most favourable light. To ensure independence of the report, purchasers may wish to obtain their own reports.

If implemented, the proposal may not result in cost savings for the purchaser, as the purchaser will be required to reimburse the vendor for the cost of the reports in addition to any independent reports they have commissioned separately.

Currency of reports

Another issue of concern is the duration of time for which a report remains valid and useful before it becomes out of date. This issue will arise particularly if a purchaser is found several months after pre purchase reports were commissioned by the vendor. The purchaser or incoming mortgagee may insist on procuring a fresh report where the cost saving rationale would be somewhat defeated. Even if a use by date were to be prescribed by the Regulations, the purchaser would be under no obligation to rely on it.

Building and pest inspectors

By law in NSW, neither building nor pest inspectors are required to be licensed to author a report, although it is encouraged that a suitably qualified person be commissioned to prepare the report. Furthermore, should pre purchase reports be required by compulsion, the relevant industries could be in a position to drive up the cost of preparing these reports.

What other reports should a vendor supply to potential purchasers in the sale of property in NSW?

As mentioned above, in the ACT, pre purchase inspection reports are not limited to only building and pest inspection reports. Vendors are required to also provide an asbestos report/advice and an energy efficiency rating statement. An asbestos report identifies the existence of any asbestos on the property and how the asbestos should be managed. An energy efficiency rating statement gives details about the energy efficiency of a property.

Are there any other additional reports that should be included in a contract for the sale of land in NSW?

Liability of the author of a report for false or misleading content

In NSW, a purchaser who seeks to rely on the representations made in a pre purchase report commissioned by the vendor may experience difficulty in recovering damages for any loss caused by any error or omission in the report. This is because the vendor and the report author are the parties to the contract under which the report is prepared.

The doctrine of privity of contract prevents the purchaser from directly relying on the contract. In the ACT, the legislation gives the purchaser a direct right to sue the report author in circumstances where loss has been suffered as a result of any materially false or misleading statement or content in a report.

If in the future, a vendor be required to provide pre purchase reports to a purchaser in NSW, a similar provision of this kind will have to be adopted to overcome the issues that arise in such a case.

Invitation to comment

This brief paper has sought to identify some issues that have been raised in the interim stages of the Report. Your comments on the various issues raised in this discussion paper, and any other comments not dealt with in this paper will assist in identifying amendments that may be necessary to ensure the policy objections of the Conveyancing Act 1919 and its regulation remain appropriate for securing those objectives.

Please send your submissions to Kye Tran, Legal Services Division, Land and Property Management Authority, GPO Box 15, Sydney NSW 2001. Email kye.tran@lpma.nsw.gov.au Fax 02 9221 4303.

All submissions may be made publicly available. Should you wish to have your personal details omitted in the course of publication, please clearly indicate this in your submission.

The closing date for submissions is **COB Wednesday, 1 September 2010.**

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