



Land and Property
Management Authority



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NSW

REGULATORY IMPACT STATEMENT

*CONVEYANCING (SALE OF LAND)
REGULATION 2010*

JUNE 2010

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PART 1

REGULATORY IMPACT STATEMENT

The **closing date** for comments or submissions is **Monday, 2 August 2010** (Please see page 11 for invitation to comment).

1. TITLE AND PROPONENT OF THE PROPOSED REGULATION

The *Conveyancing (Sale of Land) Regulation 2010* will be administered by the Land and Property Management Authority and is proposed by the Hon Tony Kelly MLC, Minister of Lands.

2. RELEVANT ACT

Conveyancing Act 1919.

3. REGULATION MAKING POWER

Section 202 of the *Conveyancing Act 1919* (the Act) contains a general power to make Regulations. In addition to this section, various other sections specifically allow or require regulations to be made, such as section 52A of the same Act. A table outlining the relevant provisions of the Act and the specific power to regulate is included for completeness as Appendix 'A'.

4. LEGISLATIVE BACKGROUND

4.1 The *Conveyancing Act 1919*

The *Conveyancing Act 1919* ('Conveyancing Act') deals with the law of conveyancing and real property in New South Wales. It includes provisions governing the general rules affecting property (Part 2), general rules affecting deeds (Part 3), covenants (Part 6), mortgages (Part 7), leases (Parts 8, 9, 10 and 11) and registration of instruments at the office of the Registrar General (Part 23). In Addition, the Act includes provisions relating to the sale of land and conveyancing (Parts 4 and 5).

Section 52A of the *Conveyancing Act 1919* establishes a system of vendor disclosure and warranty that forms the basis of the conveyancing process in New South Wales. 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. This system of vendor disclosure and warranty has been working well for over 20 years. It has reduced the incidence of gazumping that was prevalent before its introduction and is well understood by the conveyancing industry.

4.2 The *Conveyancing (Sale of Land) Regulation 2005*

Consistent with the Act's objectives, the current *Conveyancing (Sale of Land) Regulation 2005* ('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.

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 in certain circumstances and does not apply where the property is sold at public auction. The Regulation prescribes a warning statement that must be included in every contract for sale of residential property and option for the purchase of residential property.

The current Regulation also deals with options for the purchase of residential property and prescribes certain types of vendors, contracts and land that are exempt from the operation of section 52 and Divisions 8 and 9 of Part 4 of the Act.

5. OBJECTIVES OF THE REGULATORY PROPOSAL

The objectives of the proposed Regulation are:

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

To achieve these objectives the Regulation prescribes:

- (i) the documents that must be attached to a contract for sale and an option to purchase land prior to the contract or option being signed by a purchaser
- (ii) the terms, conditions and warranties deemed to be included in a contract for the sale of, or option to purchase, land
- (iii) the classes of land, vendors and contracts that are exempt from the requirements of the Regulation
- (iv) the remedies available to a purchaser for breaches of the Regulation; and

- (v) the form and content of warning notices that are to be included in a contract or option.

6. OPTIONS TO ACHIEVE OBJECTIVES

The options to achieve these objectives include:

6.1 Allow the Regulation to Lapse (No regulation/Base case)

This option, known as the base case involves allowing the *Conveyancing (Sale of Land) Regulation 2005* to lapse and permitting the market to develop its own contractual terms and conventions for conveyancing practice to replace them. In most respects, this option would return the law concerning conveyancing to the situation prior to 1986 before vendor disclosure and warranty was introduced.

Prior to the original vendor disclosure and warranty provisions, introduced in 1986, the Law Society of New South Wales and the Real Estate Institute attempted to introduce a voluntary form of vendor disclosure in the 1982 standard form of contract. However, solicitors acting for vendors resisted this increase in the vendor's obligations and deleted or limited the clause requiring disclosure. It was not until the vendor disclosure and warranty legislation, the *Conveyancing (Amendment) Act 1985*, gave statutory weight to the disclosure provisions by imposing implied terms or disclosure requirements which could not be deleted or modified. At this time, vendor disclosure and warranties became the standard in conveyancing practice.

If the current regulation was allowed to lapse there would be non standard conveyancing practices. This could lead to longer times to complete conveyancing and, most importantly, greater delays before exchange of contracts, leading to an increase in the opportunity for gazumping to occur. Accordingly, this option would not achieve the objects of the Regulation.

Whilst there have been many suggestions for expansion of the vendor disclosure and warranty requirements of the Regulation, there has been no suggestion that the Regulation be repealed.

6.2 Best Practice Procedures (Self Regulation)

This option is, in effect, the same as option 1. It would make no difference whether a voluntary scheme was proposed by the organisations involved in conveyancing, or by the government.

If this option were adopted, there is no reason to believe that self-regulation would be any more successful than it was prior to 1986. Again, the result would be non-standard conveyancing practices resulting in delays in the completion of conveyancing transactions and an increase in the opportunity for gazumping to occur.

Accordingly, this option would not achieve the objects of the Regulation.

6.3 Include matters in the *Conveyancing Act 1919*

It would be possible to include the matters prescribed by the Regulation in the *Conveyancing Act 1919* rather than the Regulation. However, conveyancing practice in New South Wales is a matter that is being continually reviewed and, where change is necessary, it is faster and easier to amend the Regulation than to amend the Act.

There needs to be flexibility in the matters covered by the Regulation to facilitate responses to changing community needs, changes in market conditions and changes in conveyancing practices. Also, the various matters included in the disclosure requirements and the warranties relate to many different pieces of legislation that are constantly changing and need to respond to decisions of the Court affecting conveyancing. A number of amendments have been required to the current Regulation in response to changes in legislation, which demonstrates the need to keep the matters out of the Act and retain a Regulation.

6.4 Remake *Conveyancing (Sale of Land) Regulation 2005*

There is general acceptance of the need for a system of vendor warranty and disclosure to underpin the conveyancing process. The current system of vendor disclosure is established by s 52A of the *Conveyancing Act 1919* and its objectives can best be met by remaking the Regulation.

This is the preferred option.

7. REVIEW OF THE *CONVEYANCING (SALE OF LAND) REGULATION 2005*

The *Conveyancing (Sale of Land) Regulation 2005* commenced on 1 September 2005 after review under the *Subordinate Legislation Act 1989* of the *Conveyancing (Sale of Land) Regulation 2000*. The 2005 Regulation replaced the earlier regulation, with some amendments.

The current Regulation will be automatically repealed on 1 September 2010 pursuant to section 10(2) of the *Subordinate Legislation Act 1989*.

To assist in the review of the regulation, a committee was established to examine conveyancing issues and to recommend matters requiring amendment. This review committee included representatives from:

- Land and Property Management Authority (LPMA)
- The Law Society of NSW
- Australian Institute of Conveyancers NSW Division Limited

- Real Estate Institute of NSW
- The Office of Fair Trading.

At the beginning of the review of the regulation, a discussion paper was circulated by the LPMA which sought to identify issues for possible reform. A copy of the discussion paper has been attached as **Appendix B** of this Regulatory Impact Statement for background purposes.

Comments received in response to the discussion paper were taken into account in identifying matters for inclusion in the proposed regulation.

8. REVIEW OF VENDOR DISCLOSURE FOR RESIDENTIAL REAL PROPERTY SALES IN NSW BY MATT BROWN MP

The NSW government indicated its intention to review the practical and legislative aspects of pre-purchase reports to be provided to potential purchasers prior to auction or sale by private treaty of real property in NSW. The pre-purchase reports include, but are not limited to building and pest inspection reports. The Review will be overseen by Matt Brown MP, Member for Kiama, with secretariat support from the LPMA.

The terms of reference for this Review are attached to this Regulatory Impact Statement as **Appendix C**.

The issue of whether pre-purchase reports such as building and pest inspection reports should be available to potential purchasers has in the past been raised with the Minister for Lands and the Office of Fair Trading. On many occasions queries of this nature drew comparisons with the Australian Capital Territory (ACT) system, which places a high duty on vendors to disclose specific matters relating to the property when it is placed on the market.

The Review will investigate the costs and benefits of both the current NSW system and the ACT system and will formally assess whether a change in the current NSW system is required.

As part of the current review of the *Conveyancing (Sale of Land) Regulation 2005*, the review committee canvassed the issues associated with compelling a vendor to make pest and building reports a mandatory attachment to a contract of sale. However, given the pending Review by Matt Brown MP a final decision on this issue will be deferred.

The recommendations from the public and the review committee have been forwarded to Matt Brown MP for his information and this Regulatory Impact Statement will refer the issues to be addressed in further depth by Mr Brown's Review.

The LPMA thanks all contributors for their submissions received on this issue.

9. PRESCRIBED DOCUMENTS

One of the key elements of the current regulated conveyancing regime is the requirement for a vendor to annex certain disclosure documents to the contract for sale of land. The success of the regulated scheme depends largely on obtaining the right balance in the type of disclosure documents required to be annexed. There are numerous matters that will influence a purchaser's decision to buy a property and of which a purchaser will want to be satisfied before committing to buy. Not all of these can be addressed by the vendor annexing a disclosure document to the contract.

Given the importance of the issue the review committee considered a large number of potential disclosure documents and reports and considered the cost and benefit of each of them to the conveyancing process.

In determining whether or not to recommend inclusion of a particular document the committee took into account the following criteria.

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

On this basis the committee considered the following matters, not currently required by the regulation, to assess any need to expand the list of disclosure documents.

9.1 Pest Inspection Reports and Building Inspection Reports

As noted earlier (at Paragraph 8), whilst this issue was raised in the discussion paper and considered by the committee, further investigation will be carried out by Matt Brown's Review of Vendor Disclosure for Residential Real Property Sales in NSW.

9.2 Asbestos Report

It has been suggested that a certificate of inspection regarding the presence of asbestos for buildings be made a compulsory annexure to a contract for the sale of land.

It is not clear who would be qualified to give such a certificate, or what the certificate should contain.

The committee raised a number of concerns with mandating a report of this nature. In particular, concerns were raised regarding the qualifications necessary to assess a property, which would need to be established before such a report could become a prescribed document under the Regulation. It also noted that the presence or absence of asbestos was more of a

building issue than a conveyancing issue. It was more properly dealt with at the time a building was being renovated or demolished, not when a property was being sold.

Consequently, the committee believed that such a report should not be made a prescribed document at this time.

9.3 Residential Building Mandatory Disclosure

During the course of the review, attention was directed to the Commonwealth Government's initiatives regarding Residential Building Mandatory Disclosure, expected to commence in May 2011. One of the requirements of the national strategy would be to require owners and landlords to disclose the energy efficiency, greenhouse impact and water efficiency of residential buildings at the time of sale or lease. In practice, the proposal would require the vendor be in a position to disclose the property's energy efficiency rating before the property is marketed for sale or lease, using a prescribed home energy rating system. It has been suggested that the strategy be implemented by the vendor supplying to a purchaser and energy rating certificate, issued by a suitably qualified professional.

The Commonwealth's proposal was noted but could not be considered further given the absence of detail for the purposes of the current regulatory review.

9.4 Home Warranty Insurance Certificate for Owner Builders

Section 95(2) of the *Home Building Act 1989* prescribes that an owner builder cannot enter into a contract for the sale of land unless the owner builder, or licensed builder on behalf of the owner, supplies a certificate of insurance as an attachment to the contract for sale. Section 95(4) allows the sale to be voided in certain conditions before the completion of the contract for sale if the certificate of insurance is not annexed to the contract.

The committee considered whether the Regulation should specifically identify the owner builder certificate of insurance as a prescribed document required to be attached to the contract for sale of land. The view of the committee was that the certificate should not be included as a prescribed document as:

- Section 95(2) of the *Home Building Act 1989* already requires that the certificate be annexed to the contract for sale. The proposed amendment to the regulation would provide no additional protection to purchasers
- The Conveyancing (Sale of Land) Regulation 2005 should only prescribe documents to be annexed where the document will be required to be annexed to all contracts, not a sub clause of contracts
- The *Home Building Act 1989* requires a certificate of insurance to be annexed in certain other circumstances. To single out the requirement for owner builders would add unnecessary confusion.

9.5 Identification Survey

The committee also considered identification surveys and concluded that they should not be added to the list of prescribed documents required to be annexed to all documents. 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.

9.6 Swimming Pools Warning Statement

The *Swimming Pools Act 1992* requires private ('backyard') swimming pools in NSW to be surrounded by child-resistant barriers to prevent unsupervised access by children. A recent review of the *Swimming Pools Act 1992* has been undertaken by the Department of Local Government (DLG), with the aim of identifying ways to enhance the safety of young children in the vicinity of private pools.

Recent amendments to the Act were made in 2009 to require a high standard four-sided, child-resistant pool barrier to surround all new pools in NSW. The Act's intention is for all pools in NSW to be isolated from the house, adjoining properties and public spaces at all times, ultimately reducing the risk of toddlers drowning in backyard pools.

The DLG considered a variety of methods of enforcing compliance with the pool fencing requirements. One option involved drawing attention to the fencing requirements at the point of sale. To do this it was proposed that a warning statement similar to the current Smoke Alarms statement be prescribed in the regulation as a mandatory document (Schedule 1, cl.15).

The Review committee was generally supportive of the Swimming Pools Warning Statement being included as a prescribed document provided that it be a requirement to all contracts for the sale of land, not just those involving a swimming pool. The warning statement would then conform with the objectives of the Act that the regulations are to apply uniformly to the majority of contracts to avoid uncertainty and omissions occurring through exchange.

10. PROPOSED CHANGES TO THE REGULATION

After reviewing the regulation the committee proposed to remake the regulation with amendments. A copy of the draft *Conveyancing (Sale of Land) Regulation 2010* is annexed to this Regulatory Impact Statement as Part 2.

References to clauses and items in this paragraph have been made against the draft proposed Regulation, annexed as Part 2 of this Regulatory Impact Statement, unless otherwise stated.

10.1 Changes to Definitions

- i. The definition of 'folios of the register' now specifically includes a lease folio (Clause 3, item 3).

Since 2006, the Registrar General has introduced the concept of a 'lease folio' which enabled computer folios to be issued for commercial premises, such as office buildings, shopping centres and retirement villages that are subject to multiple leases. For these titles, a computer folio is issued for the fee simple, referred to as the 'head title', and separate folios are created for each of the lease premises within the complex. The head title records all interests relating to the fee simple, such as easements or covenants. It does not, however, record any of the leases affecting the complex. The practical affect is that the leases and all the interests affecting the leases, are recorded in the separate lease folios.

The *Conveyancing (Sale of Land) Regulation 2005* requires a vendor to annex a 'property certificate' to the contract for sale. In clause 3 of the regulation, a 'property certificate' is defined to mean a copy of the folio for the land or a computer folio certificate in relation to the land. The committee noted the potential for confusion as to whether this refers to only the folio for the head title or whether the folio for each of the lease premises should also be annexed. The proposal seeks to amend the regulation to clarify that where there is a sale of the land comprised in a lease folio the head title plus each lease folio is required to be annexed to the contract.

- ii. The definition of a 'recognised sewerage authority' now includes a licensed network operator under the *Water Industry Competition Act 2006* (Clause 3, item 1).

Schedule 1, item 2 of the regulation requires a sewerage diagram to be annexed to a contract of sale as a prescribed document. A further requirement is the diagram must be issued from a 'recognised sewerage authority'.

10.2 Changes to Prescribed Documents (Required to be Annexed to the Contract)

- i. A certificate amounting to a warning statement is proposed to be made a prescribed document for properties with swimming pools (Schedule 1, item 14).

The draft warning statement reads:

WARNING-SWIMMING POOLS

The owner of property on which a swimming pool is situated must ensure that the pool complies with the requirements of the Swimming Pools Act 1992. Penalties apply. Before purchasing a property on which a swimming pool is situated, a purchaser is strongly advised to ensure that the swimming pool complies with the requirements of that Act.

Please see paragraph 9.6 above.

- ii. Clarification that when the sale relates to a lot in either a strata scheme or a community scheme, the 'relevant property certificate' extends to dealings in relation to the common property in a strata lot or a community lot (Schedule 1, items 6(a), 7(b), 10(b), 11(a), 12(a), 13(a) and 13(c)(i)).

Schedule 1, item 4 requires that all registered instruments shown on the 'relevant property certificate' that create easements or covenants, burdening or benefiting the land must be annexed to the contract of sale. For the sale of a strata lot it is currently unclear whether this requirement refers only to registered instruments relating specifically to the strata lot being the subject of sale or whether it also includes registered instruments burdening or benefiting the common property.

Easements and restrictions burdening or benefiting the land on which a strata building is erected are recorded on the common property folio, not the folio for the individual strata unit. Only easements and restrictions relating specifically to the individual strata unit are recorded on the individual strata folio for the unit.

It is considered that copies of all registered instruments creating easements, covenants, or profits-a-prendre that are shown on the common property folio are required to be annexed to the contract where a strata lot/s is being purchased. The proposed amendment is being made to clarify the existing requirement and will not propose any additional obligation on vendors.

A similar clarification is required for the sale of lots in a community/precinct/neighbourhood scheme. Copies of registered instruments creating easements and covenants etc affecting or burdening the relevant association property lot must be annexed to the contract for sale of a community/neighbourhood/precinct lot. A further amendment to clause 4 will be required to achieve this.

The same changes have been proposed to extend to community lots.

- iii. Clarify that in a situation where a contract for sale includes the sale of 1 or more lots within a strata scheme, that only one section 149 *Environmental Planning Authority Act 1979* Certificate is required (Schedule 1, item 1).

Schedule 1, item 1 of the current regulation requires the attachment of a section 149 Certificate to a contract of sale as a prescribed document. Upon request and payment of a fee, the certificate is issued by the relevant Council.

Some contracts for the sale of premises within a strata scheme involve more than one lot, with one lot comprising the unit and another being a utility lot, such as a garage and store room. In these circumstances it is considered that there is no need for a separate s149 Certificate to be annexed to the contract for each strata lot.

To clarify the requirements of such a situation in the case of land comprising one or more lots in a strata plan, the s149 certificate that is annexed to the contract may relate to any lot in the plan. This would remove the need to obtain separate s149 Certificates for both the unit lot and each ancillary lot sold within the complex, such as a car space or storage area, as the current regulation may on a literal interpretation presume.

10.3 Other Changes

- i. There are changes to the Regulation's format which have been designed to enhance readability. The draft Regulation has removed references or simplified some notes and has redesigned to abolish all the Regulations divisions and separated the content into 6 parts. In addition, Schedule 1 has been reshuffled to group like matters together (whole regulation).
- ii. Minor updates to the prescribed persons and bodies that may issue certificates that may be relied upon by both the vendor and the purchaser (Clause 9 (c) and (d)).

The proposed changes in the draft regulation have the general support of the Review Committee.

11. IMPACT ASSESSMENT OF PROPOSED STATUTORY RULE

POPULATION AFFECTED

The proposed regulation will affect all persons buying and selling real estate and those involved in the process, such as solicitors, licensed conveyancers, legal searchers and real estate agents.

While the Regulation is likely to affect a large proportion of the people in the State at some time, the frequency of that impact will be extremely low for the general public as the activities affected by the Regulation (buying and selling real estate) are more infrequent rather than everyday occurrences for most people.

In the 2009 calendar year 196,265 transfers were registered at the Land and Property Management Authority.

A transfer is the document that, once registered, gives effect to the sale and purchase of real estate. The incidence of transfers therefore is a good indication of the population affected by the

Regulation over a twelve month period.

While that figure does not include the number of conveyancing transactions relating to old system land, these would be relatively few. Also, no statistics are available to indicate the current proportion of transfers that are exempted from the operation of section 52A and Part 4 Divisions 8 and 9 of the *Conveyancing Act 1919* by the Regulation itself. Correspondingly, no statistics are available to indicate what proportion of those transactions affect residential property and are therefore subject to the whole of the Regulation.

COSTS

Cost to the Government

The cost to the Government of introducing the proposed Regulation is the cost of drafting and making the proposed Regulation (Direct/Tangible).

There are no ongoing administrative costs to the Government after making of the Regulation.

Cost to the Public

The costs to the public of the proposed Regulation are:

1. *The costs of providing the prescribed documents that are required to be attached to a contract or option.*

The Regulation continues the existing requirement in the *Conveyancing (Sale of Land) Regulation 2005* for certain documents to be attached to the contract (Direct/Tangible).

However, when assessing the impact of the regulation on the conveyancing public in general, it is considered that the Regulation does not so much impose new costs, but rather determines when in the conveyancing transaction they arise and who will be liable for them by shifting the burden of obtaining the prescribed documents to the vendor. Before the vendor disclosure and warranty provisions were introduced the prescribed documents would have been obtained by the purchaser, or a number of prospective purchasers, prior to exchange of contracts.

Also, the vendor will usually be in a position to give the warranties without the need to acquire certificates from the various authorities and attach them to the contract. However, if the vendor does attach a certificate the legislation allows the purchaser to rely on the certificate obviating the need for the purchaser to acquire a second certificate prior to exchange of contracts.

It must be remembered that if not for the Regulation formalising requirements for disclosure, it could be the case that a number of prospective purchasers would, in the race to exchange contracts, each acquire their own copies of documents. The money expended on these searches would be wasted for the parties who do not succeed in acquiring the property.

Further, since the majority of conveyancing transactions involve a person selling one property and buying another, the costs the vendor incurs on the sale, by having to pay for the certificates to be attached to the contract, are saved on the purchase.

The actual cost of obtaining the prescribed documents will vary depending on the nature of the property and encumbrances that affect it. Some examples of the prescribed documents in common transactions and the cost of obtaining them are set out in Appendix "E".

Thus, it is considered that the cost impact will be low or negligible for industries, consumers, regional firms and consumer groups.

2. *The cost of including the prescribed notices in the contract or option.*

With regard to the proposed Warning Statement for swimming pools (see paragraph 9.6 above), the LPMA notes the Law Society's amendments in the upcoming release of the Contract for Sale of Land 2010 Edition and has been working in conjunction with the Law Society to include the Swimming Pools Warning Statement as part of the Contract, should the proposal be adopted. This would minimize unnecessary administration and ease the transition for property practitioners. Thus, there will be no additional cost in complying with the Regulation. (Direct/Tangible)

3. In some cases, the vendor will elect to attach to a contract a document or certificate from one or more of the various authorities listed in Part 3 of Schedule 3 of the Regulation (relating to the warranties deemed to be included in a contract or option).

However, in most cases the vendor will not need to obtain and attach certificates from any authority relating to an item covered by the deemed warranty. Instead, the vendor will be able to rely on his or her knowledge of the property in order to make the warranties.

The purchaser may exchange contracts and then obtain the relevant certificates to test the warranties secure in the knowledge that, should the property be affected contrary to the warranty, the contract may be rescinded. If the vendor decides to attach one or more certificates, then section 52A(3) provides that the purchaser, or a mortgagee of the purchaser, may rely on the certificate as if it had been issued to the purchaser or mortgagee.

Either way, the searches of the various authorities are those that would be done by or on behalf of a prudent purchaser whether or not the Regulation is made. The difference is that the searches would have to be done prior to exchanging contracts if not for the warranties included by the Regulation. Accordingly, exchange is delayed increasing the risk that the purchaser will be gazumped. (Direct/Intangible)

BENEFITS

1. The purchaser is in a position to make a decision whether to purchase very quickly. The prescribed documents give the purchaser essential information regarding the property and the deemed warranties allow the purchaser to exchange without first having to make the normal enquiries of organisations that may have proposals affecting the property. This complements the cooling off provisions in the Act to allow an early exchange and speed up the conveyancing process. (Direct/Intangible)
2. The opportunity for gazumping to occur is reduced. (Direct/Intangible)
3. The Regulation brings an added element of certainty and standardisation to conveyancing and complements the use of the Law Society and Real Estate Institute standard contract, and assists in the efficient completion of a transaction. (Indirect/Intangible)
4. Purchasers are relieved of the necessity of acquiring the prescribed documents required to be attached to the contract. (Direct/Tangible)

12. IMPACT ASSESSMENT OF ALTERNATIVE OPTIONS

OPTION 1 - DO NOTHING

COSTS

To the Government

- Nil

To the Public

- The direct/tangible costs would be the same as in the preferred option as the documents prescribed are those that would normally be required in all conveyances. However, in most cases the expense of acquiring the documents would be borne by the purchaser.
- As purchasers would not have essential documents immediately available, exchange of contracts would be delayed and the conveyancing process would generally take longer to complete. (Direct/Intangible).
- The opportunity for gazumping to occur would be increased. (Direct/Intangible).
- Without the Regulation the conveyancing market would return to a complete caveat emptor (let the buyer beware) situation. The onus would be upon purchasers to satisfy themselves that the property is not detrimentally affected by any matter. By not making the Regulation the consumer protections contained in section 52A and Part 4 Divisions 8 and 9 of the Act would be significantly weakened. (Indirect/Intangible).

BENEFITS

To the Government

- The Government would save the cost of promulgating the Regulation. (Direct/Tangible)

To the Public

- In some cases properties would be able to be put on the market faster without the need to obtain the prescribed documents to attach to the contract. (Direct/Intangible).

OPTION 2 - BEST PRACTICE PROCEDURES (SELF REGULATION).

COSTS

To the Government

- If the Government were to develop and publicise best practice procedures, there would be a cost in developing the procedures and in ensuring that information was readily available to the public and conveyancing industry. (Direct / Tangible)

To the Public

- The direct/tangible costs would be the same as in the preferred option as the documents prescribed are those that would normally be required in all conveyances.
- As purchasers may or may not have the benefit of having the essential documents immediately available, exchange of contracts could be delayed and the conveyancing process would generally take longer to complete. (Direct/Intangible).
- The opportunity for gazumping to occur would be increased. (Direct/Intangible).
- There would be confusion concerning the contract and the rights and obligations of the parties. If the parties complied with the voluntary standards many of the benefits of the Regulation would still apply. However, purchasers could not be certain whether the vendor has elected to comply with all, only some or none of the best practice requirements. The onus would be upon the purchaser to determine the degree of compliance and assure themselves that the property is not detrimentally affected by any matter. The element of uncertainty involved would be likely to increase delays in conveyancing and lead to increased costs. (Indirect/Intangible).

BENEFITS

To the Government

- None.

To the Public

- Some vendors could elect not to comply with the best practice procedures and save the cost of disclosing various documents in the contract. (Direct/Tangible but not uniform). While vendors would save in this situation, purchasers would be liable to increased costs to obtain the documents. Moreover, a number of prospective purchasers may be put to the same cost while competing for the property.

OPTION 3 - INCLUDE MATTERS IN THE CONVEYANCING ACT 1919

COSTS

To the Government

- The cost of enacting the provisions as part of the *Conveyancing Act 1919* would be higher than for making the Regulation. The commitment of resources by the Department and Parliamentary Counsel would be similar but the additional cost in terms of Parliamentary time and resources means that the overall cost to the Government would be higher. (Direct/Tangible).
- The same comments would apply to any amendment which might be necessary later.

To the Public

- The same as in the preferred option.

BENEFITS

To the Government

- The same as in the preferred option.

To the Public

- The same as in the preferred option.

13. OVERALL ASSESSMENT

The direct/tangible costs are the same for all options with the difference being that in Options 1 and 2 the tangible costs may be borne by either the purchaser or the vendor. The option of not making the regulation is included as a compulsory option under the regulatory review process. However, it can be seen from the assessment of Options 1 and 2 that the objectives of the regulation will not be met if the controls contained in the regulation are not continued.

Option 2 could be more expensive to the government than Options 3 or 4 as there would be an ongoing need for the production and distribution of material publicising the best practice procedures. Option 3 would be more expensive than Option 1 and has the added disadvantage that it reduces the Government's ability to quickly respond to changes and trends

in conveyancing. The conveyancing market, and the underlying problem of gazumping, is very responsive to overall economic conditions. As market conditions change, and properties become easier or more difficult to sell, conveyancing practices also become more or less competitive, possibly creating a need to adapt the controls included in the Regulation. Accordingly, it is considered that the flexibility offered by using regulations within the framework of the existing Conveyancing Act provisions should be retained.

Overall, it is considered that Option 4, the proposed Regulation, is the most cost effective and practical means of meeting the objectives of the Regulation.

14. CONSULTATION

Consultation prior to the publication of this Regulatory Impact Statement has been principally in the form of the Conveyancing (Sale of Land) Regulation Review Committee 2010.

The Committee Members are listed in Appendix "F". The LPMA takes this opportunity to thank the committee members for their input.

15. INVITATION TO COMMENT

Comments or submissions with regard to the draft Regulation may be sent to:

Kye Tran
Legal Services Division
Land and Property Management Authority
GPO BOX 15
SYDNEY NSW 2001

Or

DX 17 SYDNEY

Or email to:

kye.tran@lpma.nsw.gov.au

The **closing date** for comments or submissions is **Monday 2 August 2010**.

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APPENDIX A

REGULATION MAKING POWERS RELEVANT TO THE DRAFT *CONVEYANCING (SALE OF LAND) REGULATION 2010*

Sections of the Act	Matter to be Prescribed
s. 52A(2)(a)	Prescribed documents to be attached to contract for sale of land prior to signing by purchaser
s. 52A(2)(b)	Prescribed terms, conditions and warranties deemed included in contract for sale of land
s. 52A(3)	Certificate etc of prescribed person or body issued to vendor may be relied upon by purchaser
s. 52A(5)(a)	Prescribed vendors exempted from s. 52A(2)
s. 52A(5)(b)	Prescribed contracts exempted from s. 52A(2)
s. 52A(5)(c)	Prescribed contracts exempted from s. 52A(2)
s. 52A(6)(a)	Remedies and relief available for failure/refusal to comply with s. 52A or regulations
s. 52A(6)(b)	Remedies and relief available for any breach of a term, condition or warranty deemed included in contract for sale of land
s. 52A(8)	Regulations may provide that a term, condition or warranty included pursuant to s. 52A(2)(b) shall not merge upon completion
s. 52A(9)(a)	Regulations may require the inclusion in contracts of terms, conditions or warranties deemed included.
s. 52A(9)(b)	Regulations may require attachment to contract of notices or other documents
s. 66Q(2)(b)	Regulation may amend area of land deemed not to be "residential property"
s. 66X(1)	Prescribed form of statement to be included in every contract for the sale of residential property
s. 66Y(3)	Division 8 or a prescribed part of the division will not apply to prescribed vendors, purchasers, contracts or land in prescribed circumstances
s. 66ZA(1)	Prescribed terms, conditions and warranties deemed included in option for purchase of residential land
s. 66ZA(2)(a)	Remedies and relief available for failure/refusal to comply with Division 9 or regulations
s. 66ZA(2)(b)	Remedies and relief available for any breach of a term, condition or warranty deemed included in option for purchase of residential property
s. 66ZA(3)	Regulations may adopt or modify the regulations made for the purposes of s. 52A of the Act
s. 66ZH(1)	Prescribed form of statement to be included in every option to purchase residential property
s. 66ZH(3)	Division 9 or a prescribed part of the division will not apply to prescribed vendors, purchasers, contracts or land in prescribed circumstances
s. 202	General regulation making power

APPENDIX B

Discussion Paper Review of Conveyancing (Sale of Land) Regulation 2005

March 2010

All submissions due by 5pm, Monday, 12 April 2010



Land and Property
Management Authority



How to make a submission

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

Please send all submissions to:

kye.tran@lpma.nsw.gov.au.

Otherwise, please send any paper submissions to:

Kye Tran

Land and Property Management Authority

PO Box 15

SYDNEY NSW 2001

All submissions must be received by 5pm, Monday, 12 April 2010.

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.

Introduction

Section 202 of the *Conveyancing Act 1919* ('the Act') contains a general power to make regulations. *The Conveyancing (Sale of Land) Regulation 2005* was made under the general power and commenced on 1 September 2005 after a review of the regulation pursuant to the Subordinate Legislation Act 1989. The 2005 regulation replaced the earlier regulation, with some amendments.

The regulation requires that a vendor disclose, through annexure to the contract, information about title, zoning, sewerage, easements and covenants that affect the land. The regulation also deals with purchasers remedies, cooling off rights and options for the purchase of residential property.

The Land and Property Management Authority (LPMA) is responsible for the administration of the act and the regulation. Consistent with previous reviews of the regulation, a working group has been established to examine current conveyancing issues and to recommend any amendments to the conveyancing legislation deemed necessary. The working group consists of representatives from the LPMA, the Office of Fair Trading, Law Society of NSW, Australian Institute of Conveyancers NSW Division Limited and the Real Estate Institute of NSW.

This paper discusses the issues that have been raised in relation to the Regulation's implementation.

The Minister for Lands and the LPMA encourage any person who has an interest in the regulation or matters directly affecting the regulation to put forward their views and raise any matters in the regulation that ought to be considered for regulatory change.

Purpose of review

As the current regulation will be automatically repealed on 1 September 2010 pursuant to section 10(2) of the *Subordinate Legislation Act 1989*, a remake of the regulation is intended to take effect upon the expiry of the current regulation.

The purpose of this review is to assess the current practical and legislative aspects of conveyancing, and to investigate and make recommendations for any changes with respect to the regulation that will simplify and speed up the conveyancing process in NSW.

In conjunction with the Parliamentary Counsel's Office, the review will also seek to undertake some changes to the format of the Regulation. Such changes would include updating citation to Acts and enhancing overall readability. The draft Regulation will be available for public comment within the coming months as an attachment to the Regulatory Impact Statement of this Regulation.

The current review of the regulation is intended to maintain the conveyancing objective of balancing what a vendor must disclose with what a buyer can reasonably confirm through their own enquiries.

3. Proposals for reform

Vendor disclosure and warranty

Section 52A (2) (a) of the *Conveyancing Act 1919* requires the vendor under a contract for the sale of land to attach to the contract such documents as may be prescribed. The documents that are required include a copy of the title for the land, a copy of the plan for the land, any documents creating easements, restrictive or positive covenants, a sewerage diagram where available and a section 149 *Environmental Planning and Assessment Act 1979* certificate. Additional documents are required for land in strata or community schemes relating to common or association property as the case may be, as well as the management provisions for the scheme.

Consistent with reviews conducted of the same regulation in the past, suggestions have been received that the following should be made additional compulsory annexures to the contract for sale of land:

- (a) Building Inspection Reports
- (b) Pest Inspection Reports
- (c) Asbestos Inspection Reports
- (d) Residential Building Mandatory Disclosure
- (e) Home Warranty Insurance Certificate for Owner Builders
- (f) Swimming Pool Barrier Compliance Statement or Certificate
- (g) Survey Report

Each of these items are discussed below.

A. Building Inspection Reports

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.

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. Further issues may arise when a vendor commissions several reports as a vendor's objective may 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. 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. There are also issues with regard to the length of time for which a report would remain current enough to be considered reliable.

Previously, building inspection reports were rejected as a compulsory annexure in past reviews of this regulation 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 practice that was later legislatively abolished

pursuant to 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.

B. Pest Inspection Reports

A pest inspection report is given by a person who physically inspects a property and reports on the presence or absence of various pests, with wood destroying pests such as termites being of particular concern. 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 required for persons who only carry out inspections and issue reports.

It would, however, be possible to require that a report can only be given by a licensed controller having specific experience or training.

The same issues regarding currency of the report arise with pest reports as with building inspection reports. It is acknowledged that the difficulty with prescribing time limitations for these pre purchase reports, is that any time limit prescribed by regulation would be 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. In addition, a purchaser or incoming mortgagee may insist on procuring a fresh report thereby defeating the cost saving rationale.

Furthermore, in NSW, a 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 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, 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 is required to provide building or pest inspection 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.

Issues for discussion

- Should vendors be required to supply building, and/or pest reports to contracts for the sale of land?
- Would purchasers feel more comfortable obtaining their own reports?
- Should a purchaser who relies on the information supplied in the report be able to initiate proceedings against a report author when the content is misleading, negligent or otherwise incorrect?
- How can the statutory regime in NSW operate to prevent vendors from supplying favourable reports to potential purchasers? What means should be undertaken to ensure compliance with any rules prescribed which are associated with the regime?
- Should the validity of reports be time limited? For example, 3 months after the preparation of the report? Consideration should be given to a scenario where a fault arises after a report is prepared but within the 3 month period, for both pest and building issues.
- Will purchasers be advised to commission their own report, either before exchange of contracts or after exchange to 'test the warranties'?

C. 'Asbestos Inspection' Reports

It has been suggested that a certificate of inspection regarding the presence of asbestos be made a compulsory annexure to a contract for the sale of land.

It is not clear who would be qualified to give such a certificate, or what the certificate should contain. In the ACT, an asbestos report/advice is also a mandatory document to be attached to a contract for the sale of land. An asbestos report identifies the existence of any asbestos on the property and gives advice as to how the asbestos should be managed.

Another option would be to have the presence of asbestos included as standard content in a building report.

Issues for discussion

- Should an asbestos inspection report be made a mandatory document to be annexed to a contract for the sale of land?
- If so, what form should the 'asbestos inspection' report take?

D. Residential Building Mandatory Disclosure ¹

In July 2009, the Council of Australian Governments (COAG) published a National Strategy for Energy Efficiency. One proposed measure of the national strategy would require owners and landlords to disclose the energy efficiency, greenhouse impact and water efficiency of residential buildings (herein referred to as Residential Building Mandatory Disclosure), at the time of sale or lease. In practice, the proposal would require the vendor be in a position to disclose the property's energy efficiency rating before the property is marketed for sale or lease, using a prescribed home energy rating system. It has been suggested that the strategy be implemented by the vendor supplying to a purchaser,

¹This information is being supplied on behalf of the NSW Department of Environment, Climate Change and Water.

the relevant rating in the form of a single Certificate, issued by a suitably qualified professional. It is envisioned that the Certificate will be attached to the contract for sale (as a prescribed document) or contract for lease. At the time of printing, the Residential Building Mandatory Disclosure is intended to commence in May 2011. More information on the nature and scope of the proposed Residential Building Mandatory Disclosure will be available within the coming months through the Australian Government Department of Climate Change and Energy Efficiency by release of a Regulatory Impact Statement (RIS).

The RIS will allow time for community consultation and instructions on how to comment or provide submissions on the national strategy will be made available in the upcoming RIS.

Upon the legislative commencement of Residential Building Mandatory Disclosure, it is considered necessary to attach the 'Certificate' to a contract for the sale of land as a prescribed document in the Regulation to ensure consistency in conveyancing practice.

E. Home Warranty Insurance Certificate for Owner Builders

In NSW, private individuals can undertake residential building work by application for a permit issued by the Office of Fair Trading. Permit issue is subject to certain conditions, such as obtaining home warranty insurance if the value of work exceeds the amount of \$12,000.

Section 95(2) of the *Home Building Act 1989* prescribes that an owner builder cannot enter into a contract for the sale of land unless the owner builder, or licensed builder on behalf of the owner, supplies a certificate of insurance as an attachment to the contract for sale. Section 95(4) allows the sale to be voided in certain conditions before the completion of the contract for sale if the certificate of insurance is not annexed to the contract.

Currently, there is no reference to the requirement to attach a certificate of insurance in circumstances described above in the *Conveyancing (Sale of Land) Regulation 2005*, although it appears in the List of Documents in the Standard Contract for Sale of Land, 2005 Edition. It is considered necessary to include the requirement to attach a certificate of insurance under the *Home Building Act 1989* into the proposed *Conveyancing (Sale of Land) Regulation 2010* to enhance consistency and to provide linkages for conveyancing practice.

F. Swimming Pool Barrier Compliance Statement or Certificate ²

The Minister for Local Government has responsibility for the administration of the *Swimming Pools Act 1992* and its Regulation in NSW. This legislation provides for private ('backyard') swimming pools in NSW to be surrounded by child-resistant barriers to prevent unsupervised access by children.

A comprehensive review of the *Swimming Pools Act 1992* was recently undertaken by the Department of Local Government to identify any appropriate amendments to enhance the safety of young children in the vicinity of private pools. Recent amendments to the act were made in 2009 to require a high standard four-sided, child-resistant pool barrier to surround all new pools in NSW.

The Act's intention is for all pools in NSW to be isolated from the house, adjoining properties and public spaces at all times, ultimately reducing the risk of toddlers drowning in backyard pools. The Department of Local Government is currently considering further amendments to require barriers on existing pools to be upgraded to the latest standard at either point of sale and/or point of time.

Issues for discussion

- Should a written confirmation of compliance under the *Swimming Pools Act 1992* for barriers on existing swimming pools be attached to the Contract of Sale of Land to be made applicable for properties with a swimming pool?

² This information is being sought on behalf of the Division of Local Government, Department of Premier and Cabinet.

- If so, what form would be the most appropriate to attach? A swimming pool barrier compliance statement by the vendor (not requiring inspection by the local council), or a Compliance Certificate issued by the relevant Council (requiring inspection by council)?

G. Survey Report

Another inquiry often made during the conveyancing process relates to survey. An identification survey can be prepared by a surveyor to ensure that the boundaries of the property being purchased correspond to the dimensions shown on the relevant plan. The survey will also disclose whether there are any encroachments from or onto the subject land and will confirm whether the buildings on the land being purchased comply with the relevant council ordinances regarding setback from the street, distances from boundaries and compliance with the terms of any restrictions on use of land.

Minor irregularities disclosed in a survey report, such as fences that deviate from the boundaries by a few millimetres are not generally matters of such concern to a potential purchaser that would cause a sale to fall through. However, more serious irregularities such as an encroachment by or upon the property or non-compliance with council ordinances are matters which would concern a potential purchaser or mortgagee and may amount to a defect in title. The identification survey would be useful in this situation, and will inform the purchaser of the severity of any compliance issues relating to the property that require rectification as the incoming owners may be liable for any identified defects.

The cost of the survey is an issue of concern. The typical identification survey costs range from \$500 to \$1000 and if added as a prescribed document it may be borne by the vendor. In assessing whether a survey should be made a prescribed document, a secondary issue arises as to who should be liable to pay for the cost of the survey. It may be argued that the cost of the survey shouldn't fall on the purchaser given the warranty under the Regulation which prescribes that issues such as an encroachment amount to an adverse affectation and alone is enough for a purchaser to rescind the contract up until settlement.

Issues for discussion

- Should an identification survey be included as a prescribed document?
- In light of the Regulations prescribed warranties, if a survey is required to be attached to a contract for sale of land, should the vendor or the purchaser be liable for the costs associated with conducting the survey?

Warranty in contract

The Regulation prescribes a number of warranties that are deemed to be included in a contract for the sale of land. As a result the purchaser is in the position of being able to exchange contracts without having to go to detailed areas of enquiry to speed up the conveyancing process

Adverse Affectations

Under a Contract for Sale of Land, an adverse affectation is taken to be disclosed in the contract if the documents listed in Part 3 of the regulation are attached to the contract.

Clauses 2 of Part 1 and Part 2 provide specific descriptions of what is deemed to be an 'adverse affectation' for the purposes of the contract of sale of land.

Disclosure of Acquisition

There are currently three clauses in the Regulation that require the acquisition of a whole, or any part of land, to be an adverse affectation when a proposal is made by:

1. The Minister for Education and Training
2. New South Wales Land and Housing Corporation; and
3. Minister for Energy jointly with the Minister for Water under the *Pipelines Act 1967*.

Issues for discussion

- Should these clauses be merged to widen **any** proposal or notice of intended acquisition by the State or Commonwealth?

Adverse affectations under the Soil Conservation Act 1938 and the Native Vegetation Conservation Act 1997 and section 38 of the Native Vegetation Act 2003

LPMA makes available certain search facilities for persons interested in the land to make further independent enquiry to confirm the warranties disclosed and to ascertain further information as required. The Property Information Inquiry Service (PIIS) and the Central Register of Restrictions (CRR) are the most relevant to 'test the warranties' prescribed in a contract of sale. These services have linkages to certain information held with Local Government, the Crown and Commonwealth Agencies that affect land.

The PIIS and CRR are services independent of the Torrens Titling system which provides an interested person with a simple, readily accessible and expedient means to confirm whether the vendor has properly fulfilled his/her disclosure obligations. This would assist in enabling resolution prior to settlement of any variance between the search result and the contract.

It has become apparent that not all the provisions noted in Schedule 3, Part 3 are readily available for search through the PIIS and an interested person must make independent searches. Enhancing the capability of the PIIS and CRR search facility should be further investigated to assist interested persons in confirming affectation as they affect the land with regard to adverse affectations under clauses 15 and 16 of Part 3 of the Regulations.

Issues for discussion

- What methods can be undertaken to ensure that clauses 15 and 16 of Part 3 of the Regulations can be easily accessible for vendors to warrant and purchasers to confirm through enquiries?
- Are these warranties still required?
- Are there any other affectations as a result of legislative development that should be included in this list?

Residual issues identified in this review

1. Should any of the existing compulsory annexures to the contract for the sale of land be removed or modified?
2. Should there be any changes to the existing prescribed warranties?
3. Should there be any changes to the existing implied terms and prescribed terms?
4. Should there be any changes to the existing purchasers' remedies?
5. Should NSW adopt a "vendor statement" document (like Victoria and Queensland) where the onus is on the vendor to provide written answers to questions about the state of the property and whether they are aware of certain things that may affect the property?

Invitation to comment

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

Please refer to the start of this paper for information on how to make a submission.

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1 Prince Albert Road
Queens Square
SYDNEY NSW 2000

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APPENDIX C

Review of Vendor Disclosure for Residential Property Sales in NSW

Terms of Reference:

That Matt Brown:

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.

APPENDIX D

Meaning of residential property

66Q. (1) For the purposes of this Division, **residential property** is:

- (a) land on which are situated (or in the course of construction) not more than two places of residence, and no other improvements; or
- (b) vacant land on which the construction of a single place of residence alone is not prohibited by law; or
- (c) a lot or lots (including a proposed lot or lots) under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, comprising not more than one place of residence alone, whether constructed or in the course of construction, and including any place used or designed for use for a purpose ancillary to the place of residence.

(2) Residential property does not however include:

- (a) land or a lot that is used wholly for non-residential purposes; or
- (b) land that is more than 2.5 hectares in area (or such other area as may be prescribed).

(3) For the purposes of this section, **“place of residence”** means a building or part thereof used, or currently designed for use, as a single dwelling only, and includes outbuildings or other appurtenances incidental to any such use.

APPENDIX E

Examples of Prescribed Documents and current costs in common conveyances.

(NB Copies of title searches, plans and other documents may be obtained from Land and Property Information either over the counter or online. The online figure has been included in these examples)

Example 1.

Suburban house affected by an easement e.g. a drainage easement:

The prescribed documents and their costs are:

(i)	A section 149 certificate	40.00
(ii)	sewer diagram	11.60
(iii)	copy of Title for the land	11.30
(iv)	copy of plan for the land	11.30
(v)	copy of section 88B instrument creating the easement	11.30
	Total	\$85.50

Example 2.

House contained in a neighbourhood plan within a community scheme affected by a right of way.

The prescribed documents and their costs are

(i)	A section 149 certificate	40.00
(ii)	sewer diagram	11.60
(iii)	copy of Title for the land	11.30
(iv)	copy of section 88B instrument creating right of way	11.30
(v)	copy of Title for the neighbourhood property	11.30
(vi)	copy of Title for the community property	11.30
(vii)	copy of the neighbourhood plan	11.30
(viii)	copy of the community plan	11.30
(ix)	copy of the management statements for the neighbourhood and community (\$11.30 each)	22.60
(x)	copy of neighbourhood development contract	11.30
	Total	\$153.30

The costs in the examples apply from 1 July 2010.

With the additional documents relating to the community scheme, this is one of the most expensive examples. However, as noted previously, all of the documents listed would need to be obtained for the purposes of the conveyance whether or not the Regulation is made.

APPENDIX F

Conveyancing (Sale of Land) Regulation Review Committee 2010

Land and Property Management Authority

Leanne Hughes
Kye Tran
Robert Goncalves

Law Society of NSW

Mary Macken, President
Tony Cahill
Liza Booth
Andrew Wilson

Real Estate Institute of NSW

Tim McKibbin, CEO
Sam Kremer, Legal Counsel

Australian Institute of Conveyancers NSW Division

Alan West, CEO
Dale Turner

Office of Fair Trading (Department of Commerce)

William Murphy
David Saunders
Gabrielle Mangos

PART 2

DRAFT *CONVEYANCING (SALE OF LAND) REGULATION 2010*

Public consultation draft



New South Wales

Conveyancing (Sale of Land) Regulation 2010

under the

Conveyancing Act 1919

[*The following enacting formula will be included if the Regulation is made:*]

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Conveyancing Act 1919*.

Minister for Lands

Explanatory note

The object of this Regulation is to remake, with some amendments, the provisions of the *Conveyancing (Sale of Land) Regulation 2005*, which is repealed on 1 September 2010 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation makes provision with respect to lease folios and requires contracts for the sale of land to include a warning in relation to a land owner's obligations under the *Swimming Pools Act 1992*.

This Regulation also makes provision with respect to the following:

- (a) the documents that must be attached to a contract for the sale of land, and the terms and warranties that are taken to be included in such a contract and in an option to purchase residential property,
- (b) the form of the statement regarding the cooling off period to be included in contracts for the sale of residential property and options to purchase,
- (c) exemptions from the application of section 52A and Divisions 8 (Sale of residential property) and 9 (Options for purchase of residential property) of Part 4 of the Act,
- (d) purchasers' remedies for breaches of vendors' obligations,
- (e) savings and formal matters.

This Regulation is made under the *Conveyancing Act 1919*, including sections 52A (2), (3) and (5) (b) and (c), 66X (1), 66Y (3), 66ZA (1), 66ZH (1), 66ZK (3) and 202 (the general regulation-making power).

Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

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Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

Clause 1

Preliminary

Part 1

Conveyancing (Sale of Land) Regulation 2010

under the

Conveyancing Act 1919

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Conveyancing (Sale of Land) Regulation 2010*.

2 Commencement

This Regulation commences on 1 September 2010 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *Conveyancing (Sale of Land) Regulation 2005* which is repealed on 1 September 2010 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

building certificate means a certificate issued in accordance with sections 149A–149E of the *Environmental Planning and Assessment Act 1979*.

Crown land has the same meaning as in the *Crown Lands Act 1989*.

folio means a folio of the Register maintained by the Registrar-General under the *Real Property Act 1900*.

property certificate, in relation to land, means any of the following:

- (a) a copy of the folio for the land,
- (b) a computer folio certificate (within the meaning of the *Real Property Act 1900*) in relation to the land,
- (c) a document that contains the information contained in the folio for the land, being a document that is certified (by or on behalf of the person to whom the information has been provided) as having been provided in accordance with section 96B (2) of the *Real Property Act 1900*,

but does not include a certificate of title.

Public consultation draft

Clause 3 Conveyancing (Sale of Land) Regulation 2010

Part 1 Preliminary

recognised sewerage authority means a public authority or local authority that provides a sewage disposal service and includes:

- (a) Hunter Water Corporation, and
- (b) Sydney Water Corporation, and
- (c) a licensed network operator under the *Water Industry Competition Act 2006*.

section 149 certificate means a certificate issued under section 149 (2) of the *Environmental Planning and Assessment Act 1979*, but does not include a certificate referred to in clause 279 (2) of the *Environmental Planning and Assessment Regulation 2000*.

the Act means the *Conveyancing Act 1919*.

- (2) In this Regulation, a reference to a document of any kind includes a reference to a copy of the document.
- (3) In this Regulation, a reference to a folio for land or a computer folio certificate in relation to the land means, in the case of a lease folio, the head title and each lease folio.
Note. In such a case the head title and each lease folio would need to be attached to the contract for the sale of land.
- (4) Notes included in this Regulation do not form part of this Regulation.

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Conveyancing (Sale of Land) Regulation 2010

Clause 4

Contracts for sale of land

Part 2

Part 2 Contracts for sale of land

4 Documents to be attached to contract

- (1) For the purposes of section 52A (2) (a) of the Act, the prescribed documents that the vendor under a contract for the sale of land must attach to the contract are such of the documents specified in Schedule 1 (or such parts of those documents) as are relevant to:
 - (a) the land the subject of the contract for sale, or
 - (b) in the case of land comprising one or more lots in a proposed plan of subdivision, the land from which the lot is to be created.
- (2) In the case of land comprising one or more lots in a plan of subdivision that was registered before the date of the contract, the section 149 certificate referred to in Schedule 1 may relate either to those lots or to the land from which those lots have been created, whether or not it also relates to other land.

5 Implied term of contract for all contracts

For the purposes of section 52A (2) (b) of the Act, the term set out in clause 1 of Schedule 2 is prescribed for a contract for the sale of land.

6 Implied term of contract if strata units bought off the plan

For the purposes of section 52A (2) (b) of the Act, the term set out in clause 2 of Schedule 2 is prescribed for a contract for the sale of land if:

- (a) the contract is a contract for the sale of a lot in a strata plan or a proposed strata plan within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, and
- (b) the contract is entered into before the date of registration of the strata plan, or within 12 months after that date, and
- (c) pursuant to section 109M of the *Environmental Planning and Assessment Act 1979*, an occupation certificate (within the meaning of that Act) will be required to be issued before occupation or use of the building, or part of the building, of which the lot and access to the lot form part, may commence, and
- (d) the contract does not expressly provide that the vendor and the purchaser agree that:
 - (i) an occupation certificate will not be issued before completion in relation to the building, or part of the building, of which the lot and any part of the building reasonably necessary for access to the lot form part, and

Public consultation draft

Clause 7 Conveyancing (Sale of Land) Regulation 2010

Part 2 Contracts for sale of land

- (ii) occupation or use of the lot will not commence before the occupation certificate is issued.

7 Implied term of contract for land and house packages

For the purposes of section 52A (2) (b) of the Act, the term set out in clause 3 of Schedule 2 is prescribed for a contract for the sale of land if:

- (a) the contract is a contract for the sale of a lot in a deposited plan, or in a proposed deposited plan, and
- (b) the contract provides for:
 - (i) the erection by the vendor of a dwelling house on the lot, or
 - (ii) the sale of a dwelling house already erected on the lot, and
- (c) pursuant to section 109M of the *Environmental Planning and Assessment Act 1979*, an occupation certificate (within the meaning of that Act) will be required to be issued before occupation or use of the dwelling house may commence.

8 Implied warranty

For the purposes of section 52A (2) (b) of the Act, the prescribed warranty for a contract for the sale of land is the warranty set out in Part 1 of Schedule 3.

9 Prescribed persons and bodies

For the purposes of section 52A (3) of the Act, the following persons and bodies are prescribed as persons and bodies whose certificates and documents may be relied on by a purchaser under a contract for the sale of land in the same way as they may be relied on by the vendor to whom they were issued:

- (a) Sydney Water Corporation,
- (b) Hunter Water Corporation,
- (c) East Australian Pipeline Pty Limited (ACN 064 629 009),
- (d) Jemena Gas Networks (NSW) Ltd (ACN 003 004 322).

10 Exemptions

- (1) For the purposes of section 52A (5) (b) of the Act, section 52A (2) of the Act does not apply to the following:
 - (a) the contracts listed in Parts 1 and 2 of Schedule 4,
 - (b) the land described in Part 5 of Schedule 4.

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Conveyancing (Sale of Land) Regulation 2010

Clause 10

Contracts for sale of land

Part 2

- (2) Despite subclause (1) (b), section 52A (2) of the Act does apply to the following contracts in relation to land comprising an estate or interest referred to in item 15 of Schedule 4:
- (a) a contract for the sale of land by a mortgagee exercising a power of sale,
 - (b) a contract for the sale of the equity of redemption in land.

Public consultation draft

Clause 11 Conveyancing (Sale of Land) Regulation 2010

Part 3 Cooling off period for sale of residential property

Part 3 Cooling off period for sale of residential property

Note. Division 8 of Part 4 of the *Conveyancing Act 1919* allows a cooling off period in respect of contracts for the sale of residential property.

11 Form of statement relating to cooling off period

- (1) For the purposes of section 66X (1) of the Act, Form 1 in Schedule 5 is the prescribed form of statement relating to the cooling off period.
- (2) The statement must be legibly printed so that:
 - (a) the words shown in bold face capital letters in Form 1 are printed in bold face capital letters at least 14 point, and
 - (b) the rest of the statement is printed in bold face figures and letters at least 10 point.

12 Exemptions

- (1) For the purposes of section 66Y (3) of the Act, Division 8 of Part 4 of the Act does not apply to the following:
 - (a) the contracts referred to in Parts 1 and 3 of Schedule 4,
 - (b) the land described in Part 5 of Schedule 4.
- (2) Despite subclause (1) (b), Division 8 of Part 4 of the Act does apply to the following contracts in relation to land comprising an estate or interest referred to in item 15 of Schedule 4:
 - (a) a contract for the sale of residential property by a mortgagee exercising a power of sale,
 - (b) a contract for the sale of the equity of redemption in residential property.

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Conveyancing (Sale of Land) Regulation 2010

Clause 13

Options for purchase of residential property

Part 4

Part 4 Options for purchase of residential property

13 Implied warranty

For the purposes of section 66ZA (1) of the Act, the warranty set out in Part 2 of Schedule 3 is deemed to be included in an option to purchase residential property to which are attached:

- (a) a proposed contract for the sale of the land, and
- (b) the documents prescribed under section 52A (2) (a) of the Act.

Note. Those documents are set out in clause 4 and Schedule 1.

14 Form of statement relating to cooling off period

- (1) For the purposes of section 66ZH (1) of the Act, Form 2 in Schedule 5 is the prescribed form relating to the cooling off period.
- (2) The statement must be legibly printed, so that:
 - (a) the words shown in bold face capital letters in Form 2 are printed in bold face capital letters at least 14 point, and
 - (b) the rest of the statement is printed in bold face figures and letters at least 10 point.

15 Exemptions

- (1) For the purposes of section 66ZK (3) of the Act, Division 9 of Part 4 of the Act does not apply to the following:
 - (a) the options referred to in Part 4 of Schedule 4,
 - (b) the land described in Part 5 of Schedule 4.
- (2) Despite subclause (1) (b), Division 9 of Part 4 of the Act does apply to the following options in relation to land comprising an estate or interest referred to in item 15 of Schedule 4:
 - (a) an option to purchase residential property granted by a mortgagee exercising a power of sale,
 - (b) an option to purchase the equity of redemption in residential property.

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Clause 16 Conveyancing (Sale of Land) Regulation 2010

Part 5 Purchasers' remedies

Part 5 Purchasers' remedies

16 Purchaser may rescind contract or option

- (1) The purchaser under a contract for the sale of land may rescind the contract:
 - (a) for the vendor's failure to attach to the contract the documents prescribed under section 52A (2) (a) of the Act, or
Note. Those documents are set out in clause 4 and Schedule 1.
 - (b) for breach of the warranty section 52A (2) (b) of the Act.
Note. The warranty is set out in clause 8 and Part 1 of Schedule 3.
- (2) The purchaser under an option to purchase residential property to which a proposed contract for the sale of the land concerned is attached may rescind the option for breach of the warranty prescribed under section 66ZA (1) of the Act.
Note. The warranty is set out in clause 13 and Part 2 of Schedule 3.
- (3) A purchaser may not rescind a contract or option under subclause (1) (b) or (2) unless:
 - (a) the breach constitutes a failure to disclose to the purchaser the existence of a matter affecting the land, and
 - (b) the purchaser was unaware of the existence of the matter when the contract or option was entered into, and
 - (c) the matter is such that the purchaser would not have entered into the contract or option had he or she been aware of its existence.
- (4) A purchaser may not rescind a contract or option under subclause (1) (b) or (2) for breach of that part of the warranty set out in item 1 (d) or 4 (d) of Schedule 3 if a building certificate in respect of the building (or part of the building) to which the warranty relates has been issued since the date of the contract or option concerned.

17 Method of rescinding contract or option

- (1) A purchaser rescinds a contract for the sale of land by notice in writing served on the vendor:
 - (a) if the purchaser's right to rescind arises from the vendor's failure to attach the prescribed documents—at any time within 14 days after the making of the contract, unless the contract has been completed, and
 - (b) if the purchaser's right to rescind arises from the vendor's breach of the prescribed warranty—at any time before the contract is completed.

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Conveyancing (Sale of Land) Regulation 2010

Clause 18

Purchasers' remedies

Part 5

- (2) A purchaser rescinds an option to purchase residential property by notice in writing served on the vendor at any time before the option is exercised or ceases to be exercisable, whichever is the earlier.
- (3) A notice under this clause may be served as provided by section 170 of the Act or in such other manner as the contract or option may specify.

18 Effect of notice of rescission of contract or option

- (1) A notice of rescission of a contract for the sale of land rescinds the contract as from the time the contract was made and, in that event, the deposit and any other money paid by the purchaser to the vendor under the contract are to be refunded.
- (2) A notice of rescission of an option to purchase residential property rescinds the option as from the time the option was granted and, in that event, any consideration paid in relation to the option, and any deposit paid in relation to the purchase of the property, are to be refunded.
- (3) The rescission of the contract or option does not render the vendor liable to pay to the purchaser, or the purchaser liable to pay to the vendor, any sum for damages, costs or expenses.
- (4) However, subclause (3) does not affect any liability under the contract or option in relation to:
 - (a) the payment of damages, costs or expenses arising out of a breach of any term or condition of the contract or option, or
 - (b) the payment of damages, costs or expenses arising out of a breach of any warranty contained in the contract or option (other than a warranty prescribed by clause 8 or 13), or
 - (c) an adjustment between the vendor and a purchaser who has received the benefit of possession of the land, or
 - (d) the reimbursement of the purchaser for expenses incurred by the purchaser in complying with the requirements of any order, direction or notice in connection with the land.

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Clause 19 Conveyancing (Sale of Land) Regulation 2010

Part 6 Miscellaneous

Part 6 Miscellaneous

19 Application of amendments to this Regulation

An amendment to this Regulation does not affect a contract for the sale of land, or an option to purchase residential property, made before the commencement of the amendment.

20 Savings

The *Conveyancing (Sale of Land) Regulation 2005* continues to apply to a contract for the sale of, and an option to purchase, residential property entered into on or after 1 September 2000, and before the repeal of that Regulation, as if that Regulation were still in force.

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Conveyancing (Sale of Land) Regulation 2010

Prescribed documents

Schedule 1

Schedule 1 Prescribed documents

(Clause 4)

- 1** A section 149 certificate (unless the land is not within a local government area) for the lot.
Note. If the sale relates to more than one lot in a strata plan a single section 149 certificate may be attached.
- 2** A diagram for the land from a recognised sewerage authority (if available from the authority in the ordinary course of administration) that purports to show the location of the authority's sewer in relation to the land.
- 3** If the contract relates to land under the provisions of the *Real Property Act 1900* (including any land that is the subject of a qualified or limited folio, but not including land the subject of a contract referred to in items 6–13):

 - (a) a property certificate, and
 - (b) a copy of a plan for the land issued by the Land and Property Management Authority or any of its predecessors (except in the case of land that is the subject of a limited folio).
- 4** Copies of all deeds, dealings and other instruments lodged or registered in the Land and Property Management Authority that are shown on the property certificates for the lot and (if there is common property) the common property and that create or purport to create:

 - (a) easements, or
 - (b) profits à prendre, or
 - (c) restrictions on the use of land, or
 - (d) positive covenants imposed under Division 4 of Part 6 of the *Conveyancing Act 1919*, burdening or benefiting or purporting to burden or benefit the land or any part of the land, together with copies of all Memoranda referred to in any such instrument.
- 5** If the contract relates to land that is subject to a building management statement registered under the *Conveyancing Act 1919*, a copy of the building management statement, as in force for the time being.
- 6** If the contract relates to land that comprises or includes a lot as defined in the *Strata Schemes (Freehold Development) Act 1973*:

 - (a) a property certificate for the lot and the common property, and

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Conveyancing (Sale of Land) Regulation 2010

Schedule 1 Prescribed documents

- (b) a copy of the strata plan that shows the lot, and
 - (c) a copy of any by-law for the strata scheme to which Division 4 of Part 5 of Chapter 2 of the *Strata Schemes Management Act 1996* applies.
- 7** If the contract relates to land that comprises or includes a lease of a lot as defined in the *Strata Schemes (Leasehold Development) Act 1986*:
- (a) a property certificate for the leasehold estate in the lot, and
 - (b) a property certificate for the leasehold estate in the common property, and
 - (c) a copy of the strata plan that shows the lot, and
 - (d) a copy of the registered lease of the lot and the registered lease of the common property, and
 - (e) a copy of any by-law for the strata scheme to which Division 4 of Part 5 of Chapter 2 of the *Strata Schemes Management Act 1996* applies.
- 8** If the contract relates to land that comprises or includes a lot in a development scheme within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, a copy of the strata development contract or strata development statement.
- 9** If the contract relates to land that is subject to a strata management statement registered under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, a copy of the strata management statement, as in force for the time being.
- 10** If the contract relates to land that comprises or includes a lot (within the meaning of the *Strata Schemes (Freehold Development) Act 1973*) that is within a community scheme (within the meaning of the *Community Land Development Act 1989*):
- (a) the documents prescribed by item 6, and
 - (b) a property certificate for the community property and any precinct property, and
 - (c) a copy of the community plan, including a copy of the community management statement and any development contract registered with the community plan, and
 - (d) if applicable, a copy of the precinct plan, including a copy of the precinct management statement and any development contract registered with the precinct plan.

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Conveyancing (Sale of Land) Regulation 2010

Prescribed documents

Schedule 1

- 11** If the contract relates to land that comprises or includes a lot that forms part of a community scheme within the meaning of the *Community Land Development Act 1989*:
- (a) a property certificate for the lot and community property, and
 - (b) a copy of the community plan incorporating the lot, including a copy of the community management statement and any development contract registered with the community plan.
- 12** If the contract relates to land that comprises or includes a lot that forms part of a precinct scheme within the meaning of the *Community Land Development Act 1989*:
- (a) a property certificate for the lot, precinct property and community property, and
 - (b) a copy of the precinct plan incorporating the lot, including a copy of the precinct management statement and any development contract registered with the precinct plan, and
 - (c) a copy of the community plan incorporating the precinct scheme to which the lot relates, including a copy of the community management statement and any development contract registered with the community plan.
- 13** If the contract relates to land that comprises or includes a lot that forms part of a neighbourhood scheme within the meaning of the *Community Land Development Act 1989*:
- (a) a property certificate for the lot and neighbourhood property, and
 - (b) a copy of the neighbourhood plan incorporating the lot, including a copy of the neighbourhood management statement and development contract, and
 - (c) if the neighbourhood scheme in which the lot is situated is within a community scheme:
 - (i) a property certificate for the community property and any precinct property, and
 - (ii) a copy of the community plan, including a copy of the community management statement and any development contract registered with the community plan, and
 - (iii) if applicable, a copy of the precinct plan, including a copy of the precinct management statement and any development contract registered with the precinct plan.

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Conveyancing (Sale of Land) Regulation 2010

Schedule 1 Prescribed documents

- 14** Each of the following notices (unless the notice is printed in the contract), being a notice that is legibly printed, in bold type, with the words shown in capital letters in the heading being at least 14 point, and the rest of the notice printed in letters at least 10 point:

IMPORTANT NOTICE TO VENDORS AND PURCHASERS

Before signing this contract you should ensure that you understand your rights and obligations, some of which are not written in this contract but are implied by law.

WARNING—SMOKE ALARMS

The owners of certain types of buildings and strata lots must have smoke alarms (or in certain cases heat alarms) installed in the building or lot in accordance with regulations under the *Environmental Planning and Assessment Act 1979*. It is an offence not to comply. It is also an offence to remove or interfere with a smoke alarm or heat alarm. Penalties apply.

WARNING—SWIMMING POOLS

An owner of property on which a swimming pool is situated must ensure that the pool complies with the requirements of the *Swimming Pools Act 1992*. Penalties apply. Before purchasing a property on which a swimming pool is situated, a purchaser is strongly advised to ensure that the swimming pool complies with the requirements of that Act.

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Conveyancing (Sale of Land) Regulation 2010

Prescribed terms

Schedule 2

Schedule 2 Prescribed terms

(Clauses 5–7)

1 Objections and requisitions

Nothing in this contract or any other agreement prevents the purchaser, expressly or by implication, from making any objection, requisition or claim that the purchaser would otherwise be entitled to make in respect of:

- (a) any encroachment onto any adjoining land by any building or structure on the land, other than a dividing fence as defined in the *Dividing Fences Act 1991*, or
- (b) any encroachment onto the land by any building or structure on any adjoining land, other than a dividing fence as defined in the *Dividing Fences Act 1991*,

unless the encroachment is disclosed and clearly described in this contract and the contract contains an express term precluding the purchaser from making such an objection, requisition or claim.

2 Strata units bought off the plan

- (1) The vendor must serve at least 14 days before completion an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* (being an interim occupation certificate or a final occupation certificate) in relation to the building, or part of the building, of which the lot and access to the lot form part.
- (2) For the purposes of this clause, the part of a building comprising access to a lot is any part of the building reasonably necessary for access to the lot.
- (3) The purchaser does not have to complete earlier than 14 days after service of the certificate.

3 Land and house packages

- (1) The vendor must serve at least 14 days before completion an occupation certificate within the meaning of the *Environmental Planning and Assessment Act 1979* (being an interim occupation certificate or a final occupation certificate) in relation to the dwelling house.
- (2) The purchaser does not have to complete earlier than 14 days after service of the certificate.

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Conveyancing (Sale of Land) Regulation 2010

Schedule 3 Prescribed warranties

Schedule 3 Prescribed warranties

(Clauses 8 and 13)

Part 1 Warranty in contract

- 1 The vendor warrants that, as at the date of the contract and except as disclosed in the contract:
 - (a) the land is not subject to any adverse affectation, and
 - (b) the land does not contain any part of a sewer belonging to a recognised sewerage authority, and
 - (c) the section 149 certificate attached to the contract specifies the true status of the land the subject of the contract in relation to the matters set out in Schedule 4 to the *Environmental Planning and Assessment Regulation 2000*, and
 - (d) there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has been issued in relation to the building or structure since the matter arose, and
 - (e) if the land is burdened or purports to be burdened by a positive covenant imposed under Division 4 of Part 6 to the *Conveyancing Act 1919*, no amount is payable under section 88F of that Act in respect of the land.

- 2 For the purposes of this warranty:
 - (a) land is ***subject to an adverse affectation*** if anything listed in Part 3 of Schedule 3 to the *Conveyancing (Sale of Land) Regulation 2010* applies in respect of the land, and
 - (b) a public or local authority has a proposal in respect of land if, and only if, the authority has issued a written statement the substance of which is inconsistent with there being no proposal of the authority in respect of the land, and
 - (c) without limiting the way in which it may otherwise be disclosed, an adverse affectation is taken to be disclosed in a contract if any of the following is attached to the contract:
 - (i) a document stating or illustrating the effect of the adverse affectation,
 - (ii) a document, issued by a public or local authority, to the effect that the authority, or another such authority, has a proposal referred to in Part 3 of that Schedule,

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Conveyancing (Sale of Land) Regulation 2010

Prescribed warranties

Schedule 3

- (iii) a copy of the order, notice, declaration or other instrument giving rise to the adverse affectation,
- (iv) a copy of the page of the Gazette in which the order, notice, declaration or other instrument giving rise to the adverse affectation was published, and
- (d) **upgrading or demolition order** means any of the following:
 - (i) order No 2 in the Table to section 121B of the *Environmental Planning and Assessment Act 1979*, being an order made in the circumstances referred to in paragraph (a) or (d) relating to that order,
 - (ii) order No 12, 13 or 14 in the Table to section 121B of the *Environmental Planning and Assessment Act 1979*,
 - (iii) order No 1 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (d) relating to that order,
 - (iv) order No 3 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (c) relating to that order.

Part 2 Warranty in option

- 3 The vendor warrants that, as at the date of the option and except as disclosed in the option:
- (a) the land is not subject to any adverse affectation, and
 - (b) the land does not contain any part of a sewer belonging to a recognised sewerage authority, and
 - (c) the section 149 certificate attached to the option specifies the true status of the land the subject of the option in relation to the matters set out in Schedule 4 to the *Environmental Planning and Assessment Regulation 2000*, and
 - (d) there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has been issued in relation to the building or structure since the matter arose, and
 - (e) if the land is burdened or purports to be burdened by a positive covenant imposed under Division 4 of Part 6 to the *Conveyancing Act 1919*, no amount is payable under section 88F of that Act in respect of the land.

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Conveyancing (Sale of Land) Regulation 2010

Schedule 3 Prescribed warranties

- 4 For the purposes of this warranty:
- (a) land is ***subject to an adverse affectation*** if anything listed in Part 3 of Schedule 3 to the *Conveyancing (Sale of Land) Regulation 2010* applies in respect of the land, and
 - (b) a public or local authority has a proposal in respect of land if, and only if, the authority has issued a written statement the substance of which is inconsistent with there being no proposal of the authority in respect of the land, and
 - (c) without limiting the way in which it may otherwise be disclosed, an adverse affectation is taken to be disclosed in an option if any of the following is attached to the option:
 - (i) a document stating or illustrating the effect of the adverse affectation,
 - (ii) a document, issued by a public or local authority, to the effect that the authority, or another such authority, has a proposal referred to in Part 3 of that Schedule,
 - (iii) a copy of the order, notice, declaration or other instrument giving rise to the adverse affectation,
 - (iv) a copy of the page of the Gazette in which the order, notice, declaration or other instrument giving rise to the adverse affectation was published, and
 - (d) ***upgrading or demolition order*** means any of the following:
 - (i) order No 2 in the Table to section 121B of the *Environmental Planning and Assessment Act 1979*, being an order made in the circumstances referred to in paragraph (a) or (d) relating to that order,
 - (ii) order No 12, 13 or 14 in the Table to section 121B of the *Environmental Planning and Assessment Act 1979*,
 - (iii) order No 1 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (d) relating to that order,
 - (iv) order No 3 in the Table to section 124 of the *Local Government Act 1993*, being an order made in the circumstances referred to in paragraph (c) relating to that order.

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Conveyancing (Sale of Land) Regulation 2010

Prescribed warranties

Schedule 3

Part 3 Adverse affectations

- 5** A proposal for re-alignment, widening or siting, or alteration of the level, of a road or railway by the Roads and Traffic Authority, Rail Corporation New South Wales, Transport Infrastructure Development Corporation or Rail Infrastructure Corporation.
- 6** A proposal by or on behalf of the Minister for Education and Training to acquire the whole or any part of the land.
- 7** A proposal of TransGrid or an energy distributor (within the meaning of the *Energy Services Corporations Act 1995*) to acquire any right or interest in the whole or any part of the land.
- 8** An interim heritage order, a listing on the State Heritage Register or another order or notice under the *Heritage Act 1977*.
- 9** A proposal to acquire any right or interest in the whole or any part of the land by reason of the *Pipelines Act 1967*.
- 10** A proposal of the New South Wales Land and Housing Corporation to acquire the whole or any part of the land.
- 11** A notice to or claim on the vendor by any person, evidenced in writing, in relation to:
 - (a) any common boundary or any boundary fence between the land and adjoining land, or
 - (b) any encroachment onto any adjoining land by any building or structure on the land, or
 - (c) any encroachment onto the land by any building or structure on any adjoining land, or
 - (d) any access order, or any application for an access order, under the *Access to Neighbouring Land Act 2000*.
- 12** An order under section 124 of the *Local Government Act 1993* to demolish, repair or make structural alterations to a building which has not been fully complied with.
- 13** A notice to or claim on the vendor by any person, evidenced in writing, in relation to a failure or alleged failure to comply with a positive covenant imposed on the land under Division 4 of Part 6 of the *Conveyancing Act 1919*.
- 14** If the contract relates to land that comprises or includes a lease of a lot as defined in the *Strata Schemes (Leasehold Development) Act 1986*—a notice to or claim on the vendor by the lessor, evidenced in writing, in

Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

Schedule 3 Prescribed warranties

relation to a breach or alleged breach of a term or condition of the lease of the lot concerned.

- 15** A right of way under section 164 or 211 of the *Mining Act 1992*.
- 16** A licence under section 13A of the *Water Act 1912*.
- 17** Any of the following under the *Stock Diseases Act 1923*:
- (a) an order under section 7 (1) (c) or (d), 8 (1) (a), (b), (c1), (d) or (f), 13 (2) or 17 (1),
 - (b) a notice under section 8 (1) (c),
 - (c) a declaration under section 10, 11A or 15 (1),
 - (d) an undertaking under section 11,
 - (e) an appointment under section 12 (a),
 - (f) an authorisation under section 12 (b).
- 18** Any of the following under the *Stock (Chemical Residues) Act 1975*:
- (a) an order under section 5 (1) (d) or (e) (ii) or 11 (1) or (2),
 - (b) a requirement under section 7 (1) or 8 (1),
 - (c) an undertaking under section 7A (1),
 - (d) a restriction or prohibition under section 12 (1).
- 19** Any of the following under the *Soil Conservation Act 1938*:
- (a) a requirement under section 15A (1) or 22 (1),
 - (b) a notification under section 17 (1) or (7) (c) or 20 (1),
 - (c) a notice under section 18.
- 20** Any direction under section 38 (1) of the *Native Vegetation Act 2003*.
- 21** Any application for an order under the *Trees (Disputes Between Neighbours) Act 2006* or any order under that Act that requires work to be carried out in relation to a tree if that work has not been carried out fully in compliance with that order.

Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

Exempt contracts, options and land

Schedule 4

Schedule 4 Exempt contracts, options and land

(Clauses 10, 12 and 15)

Part 1

(Clauses 10 and 12)

- 1 A contract between the owners of adjoining land that will result solely in an adjustment of a common boundary.
- 2 A contract between co-owners providing for the acquisition by one or more co-owners of the whole or any part of the share or interest of any other co-owner.
- 3 A contract for the sale of land to the Roads and Traffic Authority, if the contracts are expressed to be for the acquisition of land for the purposes of the *Roads Act 1993*.
- 4 A contract for the sale of the fee simple in the whole or part of any land the subject of a lease, holding or tenure under the *Crown Lands (Continued Tenures) Act 1989* or the *Western Lands Act 1901* to the holder of the lease, holding or tenure.
- 5 A contract for the sale of whole or part of a former public road pursuant to section 42 or 43 of the *Roads Act 1993*.
- 6 A contract for the sale of land entered into by the Minister administering the *Environmental Planning and Assessment Act 1979* pursuant to section 9 of that Act.
- 7 A contract for the sale of land entered into by the Minister administering the *Heritage Act 1977* pursuant to section 112 of that Act.

Part 2

(Clause 10)

- 8 A contract arising from the exercise of an option to purchase land where the option is contained in a will or a lease.
- 9 A contract arising from the exercise of any other option to purchase land (not being an option that is void under section 66ZG of the Act) so long as the proposed contract, and the documents (referred to in clause 4 and Schedule 1) prescribed under section 52A (2) (a) of the Act, are attached to the option.
- 10 A contract arising from the exercise of any other option to purchase land other than residential land where the terms of the option prevent its exercise earlier than 3 months after the date on which it is granted.

Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

Schedule 4 Exempt contracts, options and land

Part 3

(Clause 12)

- 11** A contract arising from the exercise of an option to purchase land where the option is contained in a will or a lease.
- 12** A contract arising from the exercise of any other option to purchase land (not being an option that is void under section 66ZG of the Act) so long as the proposed contract, and the documents (referred to in clause 4 and Schedule 1) prescribed under section 52A (2) (a) of the Act, are attached to the option.

Part 4

(Clause 15)

- 13** An option to purchase, the exercise of which would result in a contract listed in Part 1 of this Schedule.
- 14** An option to purchase land where the option is contained in a will or a lease.

Part 5

(Clauses 10, 12 and 15)

- 15** An estate or interest created by or subsisting by virtue of a mortgage, easement, permissive occupancy or profit à prendre.
- 16** An interest under a lease, other than:
- (a) a lease having an unexpired term (including any term for which the lease may be renewed at the option of the lessee) of more than 25 years, or
 - (b) a lease of Crown land having an unexpired term of more than 5 years, or
 - (c) a perpetual lease or other lease from the Crown having an unexpired term of more than 5 years, or
 - (d) a lease of a lot within the meaning of the *Strata Schemes (Leasehold Development) Act 1986*.

Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

Forms

Schedule 5

Schedule 5 Forms

(Clauses 11 and 14)

Form 1 Cooling off period (purchaser's rights)

- 1 This is the statement required by section 66X of the *Conveyancing Act 1919* and applies to a contract for the sale of residential property.
- 2 The purchaser may rescind the contract at any time before 5 p.m. on the fifth business day after the day on which the contract was made, **EXCEPT** in the circumstances listed in paragraph 3.
- 3 There is **NO COOLING OFF PERIOD**:
 - (a) if, at or before the time the contract is made, the purchaser gives to the vendor (or the vendor's solicitor or agent) a certificate that complies with section 66W of the Act, or
 - (b) if the property is sold by public auction, or
 - (c) if the contract is made on the same day as the property was offered for sale by public auction but passed in, or
 - (d) if the contract is made in consequence of the exercise of an option to purchase the property, other than an option that is void under section 66ZG of the Act.
- 4 A purchaser exercising the right to cool off by rescinding the contract will forfeit to the vendor 0.25% of the purchase price of the property. The vendor is entitled to recover the amount forfeited from any amount paid by the purchaser as a deposit under the contract and the purchaser is entitled to a refund of any balance.

Form 2 Cooling off period (purchaser's rights)

- 1 This is the statement required by section 66ZH of the *Conveyancing Act 1919* and applies to an option to purchase residential property.
- 2 The purchaser may rescind the option at any time before 5 p.m. on the fifth business day after the day on which the option was granted, **EXCEPT** in the circumstances listed in paragraph 3.
- 3 There is **NO COOLING OFF PERIOD**:
 - (a) if, at or before the time the option is granted, the purchaser gives to the vendor (or the vendor's solicitor or agent) a certificate that complies with section 66ZF of the Act, or
 - (b) if the option is granted on the same day as the property was offered for sale by public auction but passed in.

Public consultation draft

Conveyancing (Sale of Land) Regulation 2010

Schedule 5 Forms

- 4** A purchaser exercising the right to cool off by rescinding the option will forfeit to the vendor 0.25% of the purchase price of the property. The vendor is entitled to recover the amount forfeited from any amount paid by the purchaser in relation to the option or from any deposit paid in relation to the purchase of the property and the purchaser is entitled to a refund of any balance.