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Executive Officer
Urban and Coastal Water Reform Branch
Department of Environment, Climate Change
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PO Box A290
Sydney South NSW 1232

By email: coast.flood@environment.nsw.gov.au

Dear Sir/Madam,

Coastal Protection and Other Legislation Amendment Bill 2010

The Law Society appreciates the opportunity to comment on the Consultation Draft of the *Coastal Protection and Other Legislation Amendment Bill 2010*.

The Society's Property Law Committee (Committee) has considered the provisions of the draft Bill. The Committee has responsibility to consider and deal with any matters relating to property law and to advise the Council of the Law Society on all issues relevant to that area of practice. The members of the Committee are senior property law practitioners and experts.

The Committee has focused solely on those amendments that will affect conveyancing practice. For this reason, the Committee's comments relate only to the amendments proposed to the *Conveyancing (Sale of Land) Regulation 2005* (Regulation).

Amendment of the Conveyancing (Sale of Land) Regulation 2005 (Regulation)

Item 3.2 of Schedule 3 of the draft Bill provides as follows:

3.2 Conveyancing (Sale of Land) Regulation 2005

[1] Clause 3 Definitions

Insert in alphabetical order in clause 3 (1):

section 603 certificate means a certificate issued under section 603(3) of the *Local Government Act 1993*.

[2] **Schedule 1 Prescribed documents**

Insert after item 15 of the Schedule:

- 16** If the contract relates to land that is subject to an annual charge for the provision of coastal protection services under the *Local Government Act 1993*, a section 603 certificate.

A section 603 certificate is a certificate issued by the local Council which specifies details of rates, charges and other amounts due to the council in relation to a particular parcel of land. It is a certificate routinely obtained by a purchaser after exchange of contracts to allow a Council rate adjustment to be made on settlement. Where the purchaser has the benefit of a cooling-off period, the inquiry is usually not made until after the expiry of the cooling-off period. Where the contract contemplates a delayed settlement (for example, an off-the-plan purchase), the application for a section 603 certificate may not be made until close to the settlement date to ensure currency of the rating information.

Section 603 (3) of the *Local Government Act 1993* states:

- (3) The council is to issue a certificate to the applicant stating:
- (a) the rates, charges or other amounts due or payable to the council in respect of the land and when they became due or payable, or that no such rates, charges or other amounts are due or payable, and....

The draft Bill proposes an amendment to the Regulation which would make a certificate under section 603 of the *Local Government Act 1993* a prescribed vendor disclosure document where the contract relates to land that is the subject to an annual charge for the provision of coastal protection services. The Committee opposes this proposal.

Reasons for opposing the proposal- s603 certificates

The proposed amendment will create uncertainty as to whether a section 603 certificate is or is not required to be annexed (it may not be readily apparent to a vendor's solicitor whether he or she needs to obtain that certificate).

Where the property is residential property, the uncertainty extends to whether a section 603 certificate is a document required before marketing of the property can commence. Councils have different turnaround times for processing section 603 applications, but the requirement to obtain a further certificate will lead to delay in marketing and selling residential property.

Many solicitors acting for vendors will, for more abundant caution, address these uncertainties by applying for a section 603 certificate in every case where council might have levied for coastal protection services. The overall cost of conveyancing will be increased each time a vendor obtains an unnecessary certificate.

By making the certificate a vendor disclosure document, information about rates and charges will be "stale" by the time of settlement, and many purchasers will apply for their own certificate. The obtaining of two certificates per transaction also increases the overall cost to consumers of conveyancing services.

If a certificate is not attached to a contract, the purchaser will not know whether there was an obligation to attach until after it receives its own section 603 certificate. Many purchasers will not receive their own section 603 certificates within 14 days after the making of the contract (especially where the purchaser has not applied for the certificate immediately after exchange of contracts for the reasons indicated above), and will therefore have no effective remedy if the second certificate discloses a coastal protection services charge.

Section 149 Certificate

If the way of providing information about coastal protection services is to be by vendor disclosure, the Committee suggests providing the information in an alternative (more cost-effective) manner. One method of doing this would be to amend Schedule 4 of the *Environmental Planning and Assessment Regulation 2000* so that the relevant information is part of the prescribed content in a section 149(2) certificate under the *Environmental Planning and Assessment Act 1979*.

The section 149 (2) certificate is an existing vendor disclosure document issued by the local Council. It is, in the Committee's view, the logical place for this information if the rationale for its disclosure is to alert purchasers to the existence of the annual charge for the provision of coastal protection services before a proposed purchaser contracts to purchase that property.

This proposal avoids all of the pitfalls outlined above. It does not require actual knowledge of the annual charge by a vendor's solicitor as it is an existing vendor disclosure document and will be applied for in all cases. It does not cause delays in or impose additional costs on the conveyancing process. If the objective of the proposed amendment is to ensure that a purchaser is aware prior to committing to a purchase that the property is subject to an annual charge for coastal protection services, the Committee believes inclusion of the information in a section 149(2) certificate would achieve that objective.

Vendor warranty

If the mischief to be addressed by the proposed amendment is a purchaser exchanging contracts without knowing **the amount of** an annual charge for coastal protection services, the Committee suggests that the matter can be dealt with by a vendor warranty, as opposed to a section 603 certificate becoming a vendor disclosure document.

One way of achieving this would be to define the existence of an annual charge for the provision of coastal protection services as an "adverse affectation" (that is, adding a new item to Part 3 of Schedule 3 of the Regulation).

Another approach would be to amend Schedule 3 Part 1 (with a corresponding amendment to the warranty in an option set out in Part 2) of the regulation to provide an additional warranty by the vendor along the following lines:

"1 The vendor warrants that, as at the date of the contract and except as disclosed in the contract:

- (f) the land is not land that is subject to an annual charge for the provision of coastal protection services under the Local Government act 1993."

An amendment to Schedule 3 would allow a purchaser who receives a section 603 certificate after exchange of contracts in the normal course of the transaction and thereby becomes aware of the annual charge to rescind prior to completion, subject to satisfying the preconditions set out in clause 19 of the Regulation.

The Committee is reminded of the history of amounts owing under positive covenants – originally a topic for vendor disclosure, but since 2005 dealt with (in a manner that is quicker, cheaper and more efficient) by vendor warranty.

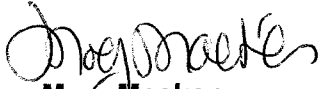
Conclusion

The Law Society is aware of current departmental reviews of both the *Environmental Planning and Assessment Regulation 2000* and the *Conveyancing (Sale of Land) Regulation 2005* in anticipation of their staged repeal and re-enactment pursuant to the *Subordinate Legislation Act 1989*. Since this submission refers to each of those regulations, a courtesy copy has been sent to the relevant departmental officers at Planning NSW and LPMA.

The Committee Chair would be happy to discuss this matter further if desired.

Once again, thank you for the opportunity to comment on the Consultation Draft of the Bill.

Yours faithfully,


Mary Macken
President

cc Sarah McGirr
Kye Tran