THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:LJB:Property Law 2010
Direct Line: 9926 0202

30 April 2010

Ms Kye Tran
Land and Property Management Authority
PO Box 15
SYDNEY NSW 2001

Dear Ms Tran

**LPMA discussion paper – Review of *Conveyancing (Sale of Land) Regulation 2005***

The Law Society appreciates the opportunity to be involved in the consultation process for the review of the *Conveyancing (Sale of Land) Regulation 2005*.

The Society's Property Law Committee (Committee) has considered the issues in the LPMA's Discussion Paper: Review of Conveyancing (Sale of Land) Regulation 2005 and provides its general comments below. Responses to the specific questions in the Discussion Paper are set out in Appendix A to this letter.

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As the current regulation will be automatically repealed on 1 September 2010 pursuant to section 10(2) of the *Subordinate Legislation Act 1989*, a remake of the regulation is intended to take effect upon the expiry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

## Vendor Disclosure Regime

The Committee believes the existing regulatory regime has worked well over a period of in excess of 20 years, is well-understood by stakeholders in conveyancing, provides an appropriate balance between the competing interests of vendor and purchaser and has generated relatively little litigation. For these reasons it is considered that there is no reason for "root and branch" change – for example, the replacement of the current regime by a Victorian-style "contract note" system.

proposed purchasers prior to their signing and binding themselves contractually. The Committee would be concerned if the level of contractual disclosure was expanded to the point where the sheer number of disclosure requirements significantly expanded the length of contracts for sale, potentially overwhelming prospective purchasers with so much information that the purchasers were unable to discern the fundamentally important data.

The Committee believes any proposal to expand the vendor disclosure regime should be benchmarked against a number of criteria, including:

- The ease and speed with which information can be obtained (and verified)
- The cost to the vendor of obtaining the information
- Whether there is a corresponding cost saving to the purchaser (which will not always be the case – where, for example, it is considered prudent or necessary for the purchaser to obtain their own document covering the same ground)
- The quality of the information – for example, is the information from a reliable source, and what if the information is in error? Is the information provider suitably qualified? Is it desirable for the provider to hold appropriate insurances?
- The importance of the information to a typical purchaser.
- The most effective means of communicating the information – By attaching to the contract a document issued by a third party? By prescribing a notice or warning?

It is important for the vendor to be able to determine easily which prescribed documents are relevant to their transaction. Since the purchaser has only 14 days to rescind for breach of vendor disclosure, it is important that, where one of the prescribed documents is absent, the purchaser can determine promptly whether the document should have been attached (as distinct from being absent because the document is not relevant to the property being sold). Typically it is plain from the contract and other available information whether the property is in a local Government area, or whether it is Torrens Title or not. Matters relating to quality (for example, insurance certificates under the *Home Building Act* 1989) may not always be so clear-cut. The history of the introduction of smoke alarm information as a prescribed document is instructive. The inclusion of the smoke alarm notice as originally gazetted involved a potentially complex judgment by the vendor (and in due course the purchaser) as to whether the notice was required or not, with potentially dire consequences if a party "got it wrong". The second gazetted version (the smoke alarm "Warning") had the benefit of being required to be included in all transactions covered by vendor disclosure (even those such as vacant land where the smoke alarms were not required as at the formation of the contract – the information was nevertheless useful if that land was developed in due course).

**Vendor Warranty**

The "touchstone" for vendor warranty is that there are a number of matters which are important to purchasers and which, in the absence of statutory or contractual warranties would need to be investigated prior to a typical purchaser entering into a contract (the investigations usually would be unable to be concluded within a cooling off period). Prior to the current system of vendor disclosure and warranty, those investigations were not infrequently undertaken prior to exchange, thereby increasing the risk of gazumping and costs being thrown away by the prospective purchaser. The warranties should be clear in their terms, easily researched by a vendor (if necessary) and readily testable by a purchaser.

The Committee notes that a number of the topics raised in the discussion paper are dependent on the actions of agencies other than LPMA. Some of these topics are the subject of detailed separate inquiry (for example, the Cabinet reference regarding quality reports) and others are dependent on future government action outside the control of LPMA (for example, Residential Building Mandatory Disclosure). One matter not raised in the discussion paper at all is the proposal set out in the Consultation Draft of the *Coastal Protection and Other Legislation Amendment Bill* 2010 to make a certificate under section 603 of the *Local Government Act* 1993 a vendor disclosure document in some circumstances (given that the Consultation Draft postdates the Discussion Paper it is understandable that this topic was not canvassed) The Committee believes it is preferable to repeal and remake the 2005 Regulation in accordance with the timetable envisaged by the *Subordinate Legislation Act* 1989 (that is, with effect from 1 September 2010) and then if need be make amendments to the 2010 Regulation rather than postpone the repeal of the 2005 Regulation.

**Other Disclosure Models - ACT**

The Committee notes that there has been some consideration in the Discussion Paper and in other forums about adoption of some aspects of the disclosure model which operates in the ACT. The Committee believes that the variations in the geography (and in particular the relative areas - what may be appropriate in a region with an area of 2,358 sq km may be entirely inappropriate in a State with an area in excess of 800,000 sq km), regulatory history and conveyancing and titling procedures in the two jurisdictions are so substantial that it would be entirely inappropriate to use the ACT procedures as a template for the NSW regime. More detailed commentary about the ACT model is attached as Appendix B.

**The way forward**

To facilitate meeting the timetable envisaged by the *Subordinate Legislation Act* 1989 (including the time required for a Regulatory Impact Statement), the Committee suggests that LPMA distribute electronically to the stakeholders represented at the April 2010 meeting copies of the submissions received in anticipation of the next stage of the consultation.

**Conclusion**

The Committee appreciates that many of these matters will require further discussion and input and welcomes very much the opportunity to be closely involved in the process to ensure a better outcome for all stakeholders.

Once again, thank you for the opportunity to provide these comments.

Yours sincerely,

**Mary Macken**
President

## Appendix A

## Detailed Comments

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| 1 | 3 | Introduction | The Committee notes that in addition to the general regulation-making power in section 202, many of the subsections within section 52A itself refer to the power to make regulations. The Committee believes that any review of the Regulation should ensure that those matters which Parliament had specifically mentioned as being appropriate for regulation (for example, subsections (2) and (4) to (9)) are considered. |
| 2 | 4 to 6 | A) Building Inspection Reports<br>B) Pest Inspection Reports | The Committee believes that any proposed extension of the vendor disclosure regime to pest reports and building reports raise sufficiently similar issues that they can be discussed together.<br><br>The last full paragraph on page 4 notes that a building inspection report "is usually carried out before exchange of sale contracts". That comment could apply equally to a pest inspection report, and for that matter to reports such as an inspection of the records of a strata or community title property. The observation within the paper could perhaps be better expressed as "is usually carried out before the sale contract becomes unconditionally binding on the purchaser". In those sales of residential property where the purchaser has the benefit of a cooling off period, it is common for that inspection to be conducted during the cooling off period. Indeed, the statutory duration of the cooling off period was chosen to allow sufficient time for a purchaser to obtain appropriate quality reports within the cooling off period.<br><br>The discussion paper outlines the purpose of each report, and lists some of the difficulties associated with making either report a mandatory disclosure document, namely:<br>• Each inspection is generally a visual inspection only;<br><br>• The risk of a vendor "shopping around" to find a report which shows the property in the most favourable light;<br><br>• The possibility of a purchaser wishing to obtain their own report, thereby adding to the costs of the purchaser since the discussion paper envisages that the purchaser will be reimbursing the vendor for the first report as well as paying for the second one; |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | • The length of time which a report would remain current enough to be considered reliable;<br>• The absence of a licensing regime, minimum educational requirements and compulsory indemnity insurance for inspectors; and<br><br>• Difficulties arising from the doctrine of privity of contract.<br><br>The Committee identifies some further difficulties:<br>• Not every prospective purchaser requires quality reports (e.g. properties to be redeveloped or substantially altered);<br><br>• Most report providers limit or exclude liability to third parties for the contents of the report;<br><br>• The difficulty in defining what constitutes a "pest report" or a "building report";<br><br>• The existing system allows a prospective purchaser to choose their preferred building or pest inspector; to be present when the inspector inspects the property; and to negotiate the fee charged by the inspector. Were the vendor to arrange such reports those benefits would be lost (unless the purchaser incurs the cost of their own reports);<br><br>• The Committee has concerns relating to attempts to pass on the cost of such reports to the purchaser – should the costs be capped or regulated in some other way;<br><br>• Concerns about how the proposal would apply to properties in rural and regional areas – what may work in the ACT (with an area of 2,358 sq km) may not be effective in New South Wales (with an area in excess of 800,000 sq km); and<br><br>• Concerns about defining precisely which properties would require pest and building reports – for example, such reports are not typically obtained for strata properties, but may well be appropriate for some such properties (for example, two-lot strata subdivisions where each dwelling is constructed wholly within the lot boundaries).<br><br>The Committee believes it is important that the availability of a cooling off period be borne in mind, lest, for example, sales by auction are treated as being on all fours with sales by private treaty. Indeed, there may |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | be real benefit in linking any provision of quality reports not to contracts for sale in general, but to the conduct of auctions. Perhaps consideration should be given to amending the *Property, Stock and Business Agents Act* 2002 (and its accompanying Regulation) to make the availability from the vendor (or their agent) of identified quality reports a pre-condition of conducting an auction rather than a prescribed document in the contract for sale. If that course were adopted, there may need to be consequential amendments to the *Conveyancing (Sale of Land) Regulation 2005* (addressing for instance possible issues such as passing on a quality report fee to a purchaser or assigning to the purchaser the right to rely on the contents of the report). |
| 3 | 6 | ISSUES FOR DISCUSSION | Following the same bullet points as in the discussion paper:<br>• Vendors should not be required to supply building and / or pest reports by attaching them to contracts for the sale of land (although there is arguably some merit in requiring the availability of those reports for some sales by auction because no cooling-off period is available; were those reports to be made available prior to auction, the reports should not be an annexure to the contract).<br>• Purchasers would feel more comfortable in obtaining their own reports. Even though an unsuccessful bidder at auction may be put to some cost in obtaining their own pest and building reports, the Committee believes that cost did not justify making those reports compulsory vendor disclosure documents.<br>• A purchaser who relies on the information supplied in a report should be able to initiate proceedings against a report order where the contract is misleading, negligent or otherwise incorrect.<br>• Any regime requiring the supply of reports where the supplier is unlicensed or unregulated faces the problem of the "tame" supplier. Short of regulating the suppliers (even if only by a "negative licensing" regime) there is little that can be done at the supply end. Presumably it could be made an offence for a vendor to fail to disclose that a report provider is in some way "related" to the vendor (or to provide a report where the provider is a related party), but how that would be policed, and how related parties would be detected by purchasers, seems all but insurmountable in the absence of a publicly |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | available, Government-regulated register of reports as exists in the ACT.<br><br>• If the circumstances in which the reports are required are limited to auctions, staleness should in the first instance be linked to the auction date. It is suggested that a report where the date of inspection is no earlier than 14 days before the date of the first auction would be appropriate. One issue would be what would happen if the property were not sold under the hammer and subsequently re-submitted to auction. Perhaps a report obtained for the first auction should have a life of two months (that should allow sufficient time for a remarketing campaign in anticipation of a second attempted auction – if the second attempt were unsuccessful there should probably be a renewed quality report before the third attempt). The Committee notes the inherent difficulty in determining the precise point in time when termites become active in a building (a difficulty which has manifested in attempts to pursue claims against pest inspectors alleging negligence in failing to report on the presence of active termites or other pests).<br><br>• The Committee believes that purchasers will in all probability be advised to commission their own pest report. The Committee thought it less likely that a purchaser would be inclined to update a building report. The Committee considered that where a purchaser wanted to update a report (the phrase "test the warranties" is not appropriate as no proposal has suggested that pest and building reports be the subject of a prescribed warranty) they would do so before the contract became unconditionally binding on them (that is, before the expiry of any cooling off period or exchange of contracts where the purchaser does not have a cooling off period). The Committee notes that in the ACT, a purchaser is given a "very strong recommendation" (in one contract the Committee has viewed the phrase is used at least three times) to obtain their own report. |
| 4 | 6 to 7 | C) "Asbestos Inspection" Reports | The Committee recognises the dangers associated with disturbing asbestos-based building materials, and the possibility that a purchaser may undertake some renovations (possibly minor and / or without engaging a builder who has expertise in identifying those properties which are likely to be affected by asbestos).<br><br>However, in the light of the difficulties in identifying who |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | would be qualified to give such a certificate or what the certificate should contain (and further difficulties such as there being no indication of the likely cost of such a certificate), the Committee does not believe that an "asbestos inspection" report should be a compulsory annexure to a contract for sale of land.<br><br>The Committee notes that the ACT Contract for Sale contemplates the provision by the vendor of either "Asbestos Advice" or a "Current Asbestos Assessment Report". If there is to be any information provided about asbestos at all, the Committee considered that a short generic form of notice would be the most appropriate means of doing so – in effect, doing for asbestos what has been done for smoke alarms. Any such notice should be drafted after consultation with Workcover as the body with greatest expertise with issues relating to asbestos removal. |
| 5 | 7 | ISSUES FOR DISCUSSION | Following the same bullet points as in the discussion paper:<br>• An asbestos inspection report should not be made a mandatory vendor disclosure document.<br>• Given the answer to the previous bullet point, the issue of what form a report should take does not arise. |
| 6 | 7 | D) Residential Building Mandatory Disclosure | The Committee believes that until more information is available about the nature and scope of the proposal there should be no attempt to prescribe the manner of disclosure in the Regulation. |
| 7 | 7 to 8 | E) Home Warranty Insurance Certificate for Owner Builders | The Committee strongly opposes any "linkage" in the *Conveyancing (Sale of Land) Regulation 2005* to disclosure requirements under the *Home Building Act* 1989.<br><br>As an opening comment the Committee notes that disclosure requirements under the *Home Building Act* 1989 extend beyond owner-builders – see sections 96(2) (applying to persons who do residential building work otherwise than under a contract) and 96A(1) of the Act.<br><br>The Committee further notes that disclosure requirements extend beyond a certificate of insurance – for owner-builders, the current requirement is to attach a conspicuous note addressing the matters set out in s 95(2A); for the other two categories, the requirement is to, prior to entry into the contract, give to the other party |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | a brochure approved by the Director-General of Fair Trading (ss 96(2B), 96(1A)).<br><br>The vendor disclosure regime serves a fundamentally different purpose from the Home Warranty Insurance provisions. Vendor disclosure applies to virtually all vendors selling land in NSW (subject to narrowly prescribed exceptions), providing what would objectively be viewed as critical or "deal-breaking" information to a prospective purchaser. Sections 95, 96 or 96A of the *Home Building Act* will be relevant to only that proportion of real estate sales where the subject matter of the sale was improved residential land; to only a small class of vendors selling such real estate; and with significant carve-outs based on the value of work done and the time at which the work was done.<br><br>Sadly, successive changes to the operation of home warranty insurance means that many would view the current scheme as providing a mere shadow of the level of consumer protection that once existed in New South Wales; very few purchasers would today regard the presence or absence of home warranty insurance as a "deal-breaker".<br><br>The Committee also notes that bringing home warranty insurance certificates within the existing vendor disclosure regime would significantly restrict rather than enhance the rights of purchasers. The 1989 Act permits rescission by the purchaser before completion. Breach of a vendor disclosure obligation allows for rescission within 14 days.<br><br>Finally, the Committee is aware that NSW Fair Trading has announced a rewrite of the 1989 Act with the commencement date of a 2010 Act foreshadowed to be 1 July 2010. The Committee is strongly of the view that regulation of the domestic building industry (including provisions about obligations on sale) should be self-contained within that, hopefully improved, domestic building legislation. |
| 8 | 8 | F) Swimming Pool Barrier Compliance Statement or Certificate | The Committee has some difficulty in coming to a conclusion on this topic given the statement that the Department of Local Government (DLG) is currently considering further amendments to the Act requiring upgrading "at either point of sale and / or point of time". Without knowing the eventual outcome of DLG's deliberations, and the likely time-frame for any amendment to take effect, it is difficult to be definitive. |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | On the current state of the law, the Committee's view is:<br>• It is important that owners of properties with private swimming pools be conversant with fencing requirements.<br>• Once those requirements are known, it should be patently clear whether the swimming pool complies or not.<br>• The prescribed fee for a certificate under section 24 of the *Swimming Pools Act* is currently up to $70 (*Swimming Pools Regulation* 2008 cl 17(1)). It would be unfortunate if that amount was added to the cost of conveyancing for every property which had a backyard swimming pool (especially where a physical inspection by a purchaser aware of the requirements could confirm compliance).<br>• The Committee believes that an order under section 23 of the *Swimming Pools Act* 1992 should be included in the list of adverse affectations in Sch 3 Part 3 of the *Conveyancing (Sale of Land) Regulation 2005*.<br>• If the DLG wishes to enhance the position of purchasers (to give them substantive rights if pool fencing is non-compliant), one possible mechanism would be to include a warranty about swimming pool fencing in Sch 3 Pts 1 and 2 of the Regulation. That approach would elevate a vendor's "statement" to a statutory warranty, breach of which would ground a right of rescission (subject to clause 19(3)). An alternative approach would be to include a new prescribed term in Sch 2 (not unlike the current prescribed term regarding encroachments).<br>The Committee recommends that whatever course may be adopted by LPMA as a result of the review of the *Conveyancing (Sale of Land) Regulation 2005*, the issue be revisited once DLG has completed its deliberations (which will hopefully incorporate a period of public consultation and perhaps an Exposure Draft of the amending Bill). |
| 9 | 8 | ISSUES FOR DISCUSSION | Following the same bullet points as in the discussion paper:<br>• An additional warranty in Sch 3 of the *Conveyancing (Sale of Land) Regulation 2005* regarding swimming pool fencing compliance (perhaps reinforced by an extensive public education campaign) would render written |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | confirmation of compliance otiose. Whether more proactive measures are necessary will depend on the outcome of considerations by DLG.<br><br>• May not arise, but if it does a statement by the vendor (not requiring inspection by the local council) is preferred. The Committee notes that a statement by the vendor would be given additional force if it were made by means of a prescribed warranty. |
| 10 | 8 to 9 | G) Survey Report | The Committee notes the cost of a "typical" identification survey would be within the range identified in the discussion paper if the property were a standard-sized Sydney suburban residential block; where the property to be sold was acreage, or in a rural or regional area the cost could be dramatically higher.<br><br>The Committee also observes that there has been a tendency over recent years for surveyors to abstain from comment in their reports on compliance with restrictions on use. Nevertheless the utility of survey reports in identifying encroachments cannot be doubted.<br><br>In previous reviews the position taken by the Law Society was that a survey was not an appropriate vendor disclosure document because of its relatively high cost, the fact that frequently purchasers can by visual inspection satisfy themselves regarding encroachments, that some purchasers (often developers) are unconcerned by the location of existing buildings and the protection afforded purchasers by the prescribed term in Sch 2 cl 1. The Committee saw no reason to change the views expressed at the earlier reviews. |
| 11 | 9 | ISSUES FOR DISCUSSION | Following the same bullet points as in the discussion paper:<br>• The Committee is strongly of the view that a survey should not be a prescribed document.<br><br>• Given the answer to the previous bullet point, the issue of who is liable for the costs associated with conducting the survey does not arise. |
| 12 | 9 to 10 | Disclosure of Acquisition | It is vital to the efficacy of the vendor warranty provisions that the warranties be specified with precision. The warranties to be given must be discernible by the vendor; the accuracy of the warranty must be testable by the purchaser. To widen the warranty to any proposal from any branch of |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | Government would make conveyancing unworkable in sending both vendors and purchasers on expensive and extensive expeditions to attempt to identify which authorities may conceivably have an interest in the property, and attempt to extract information from them. |
| 13 | 10 | ISSUE FOR DISCUSSION | The Committee strongly opposes a single, whole-of-Government adverse affectation clause. |
| 14 | 10 to 11 | Adverse affectations under *Soil Conservation Act* 1938 (and other Acts) | As indicated at item 12, it is vital to the efficient operation of vendor warranty that statutory warranties be capable of investigation by vendors, and testable by purchasers. The problem raised by the discussion paper is real, and indeed is worse than indicated in that at least one authority has indicated that it will not supply information in response to "independent search" made direct to the authority!<br><br>The Law Society has expressed its support for the Central Register of Restrictions (CRR) since its inception, and has long lamented the apparent reluctance of some government authorities to embrace the CRR.<br>The Committee also notes that a not dissimilar problem exists with Sch 3 Part 3 Items 7(d) and 17 in that there is no reliable way of testing whether an application has been made under the *Access to Neighbouring Land Act* 2000 or the *Trees (Disputes Between Neighbours) Act* 2006, and limited scope for ascertaining whether an order has been made (in the case of the latter Act, made but not fully carried out). |
| 15 | 10 to 11 | ISSUES FOR DISCUSSION | Following the same bullet points as in the discussion paper:<br>• Ensuring that information on warranty matters is easily accessible for vendors (to investigate if necessary whether the warranty is true) and purchasers (to test the warranty through inquiries) is vital for the operation of the vendor disclosure and warranty regime. Any attempts to deal with this issue must involve adopting a whole-of-government approach. Each authority identified in Schedule 3 Part 3 (including but not limited to those in items 15 and 16) must be required to have in place a regime for providing prompt, affordable and accurate replies to conveyancing inquiries (such as embracing the CRR).<br><br>• The warranties under consideration are still required. |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | • Each of the "overriding legislation" exceptions to indefeasibility set out in Sch 3 of the *Real Property and Conveyancing Legislation Amendment Act* 2009 (and any overrides which may be introduced subsequently) should also be capable of being investigated by vendors and purchasers on the same reasoning as applies to statutory warranties. |
| 16 | 11 | Residual Issues | |
| 16.1 | 11 | Existing compulsory annexures | • The Committee notes that changes to the content of Sch 4 of the Environmental Planning & Assessment Regulation 2000 (EP&A Regulation) took effect from 27 February 2009, 1 July 2009, 31 July 2009, 7 September 2009 and 26 March 2010. The Committee has expressed concerns to the Department of Planning about the short notice between publication of some of those changes on the Legislation website and their commencement (in two cases, the amendment commenced on the very day of publication) and the consequential disruption and uncertainty in the conveyancing process due to the potential rescission rights where a section 149(2) certificate was obtained prior to a change and contracts were exchanged after the change. The Committee is currently represented in a consultation process with the Department of Planning and hopes that the consultation process will result in a commitment from that Department that changes to Sch 4 (and therefore to the content of section 149(2) certificates) be publicised and published well before any commencement of the change.<br><br>• The Committee notes that with effect from 29 March 2010 responsibility for sewerage service diagrams has been transferred from Sydney Water and other water supply authorities to NSW Fair Trading. The Committee queried whether item 2 in Sch 1 (and / or the definition of "recognised sewerage authority" in clause 3) of the Regulation should be revised in the light of this change.<br><br>• The Committee also suggests that the wording of Sch 1 item 2 be reviewed for another reason. The Committee had cause to consider the wording of this item as part of a conveyancing dispute last year. One possible interpretation of the item as presently worded is that a diagram which is incorrect as to its contents does not "[indicate] the location of the authority's sewer in relation to the land" and is therefore not compliant with the |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | disclosure requirements (the contrary view was that such a diagram satisfies vendor disclosure but could ground a claim for breach of statutory warranty). It would be useful if the wording be amended to remove any doubt. |
| 16.2 | 11 | Existing prescribed warranties | The Committee suggests that the wording of item 1(b) in Sch 3 Parts 1 and 2 be reviewed. The Committee had cause to consider the wording of this item as part of the conveyancing dispute referred to in item 16.1 above. One possible interpretation of the items as presently worded is that an inaccurate diagram which shows the location of a sewer at one location of the property indicates that the land **does** "contain any part of a sewer belonging to a recognised sewerage authority" and thereby precludes any right of rescission (the contrary view was that such a diagram does not disclose the correct location of that sewer and so could ground a claim for breach of statutory warranty). Again, it would be useful if the wording be amended to remove any doubt. |
| 16.3 | 11 | Implied and prescribed terms | No changes are required to the existing implied terms and prescribed terms. |
| 16.4 | 11 | Purchasers' remedies | No change to the existing purchasers' remedies is needed. |
| 16.5 | 11 | Vendor statement? | New South Wales should not adopt a 'vendor statement' document. |
| 16.6 | | Anything else?? | 16.6.1 In the light of the growth of electronic delivery of documents references in the Regulation to the height of letters (e.g. cll 12(2) and 16(2); Sch 1 items 10 and 15) should be replaced with a "medium neutral" provision (e.g. point size).<br><br>16.6.2 The current provisions regulating options (primarily but not exclusively residential options) are in need of review. The Committee appreciates change in this area may require legislative as well as regulatory amendment and so may be unable to be achieved fully as part of this review. The Committee raises these specific issues:<br>• The current provisions could be reviewed to enhance clarity and reflect modern drafting practices.<br><br>• Any review should identify any anomalies between the treatment of residential options and the treatment of contracts for sale, and consider whether those inconsistencies ought to be resolved. |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | To take one example, the absence of the prescribed cooling off notice in a contract for sale gives the **purchaser** a right of rescission (s 66X), whereas the absence in an option gives **either party** a right of rescission (s 66ZH).<br><br>• The framing of the Act and Regulation in terms of regulating "options" reflects an era when real estate options were almost always options to purchase. Given the growth over the last 25 years in the use of put options (either in their own right or as part of a put and call) the Committee believes the provisions should be reviewed to clarify the status of put options.<br><br>• The Committee believes the decision of *Evolution Living Property Management Pty Ltd v CSP Australia Pty Ltd* [2010] NSWSC 65 (in which a call option was void by statute but the corresponding put option remained enforceable) indicates a need for change to the Act or the Regulation to overcome the result in that case.<br><br>16.6.3 Where the property being sold is one for which lease folios have been created, the Committee believes that the definition of "property certificate" in clause 3 of the Regulation should explicitly include lease folios (the intention being that not only the "parent" head folio but the "child" lease folios be prescribed vendor disclosure documents). The Committee notes that there may need to be consequential amendments (for example, to Schedule 1).<br><br>16.6.4 The Consultation Draft of the *Coastal Protection and Other Legislation Amendment Bill* 2010 released on 26 March 2010 proposes an amendment to the Regulation which would make a certificate under section 603 of the *Local Government Act* 1919 a prescribed vendor disclosure document where the contract relates to land that is the subject for the provision of coastal protection services (Sch 3 item 3.2 of the consultation draft). The Committee opposes this proposal.<br>• 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).<br><br>• Where the property is residential property, the uncertainty extends to whether a section 603 certificate is a document required before marketing |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | 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.<br><br>• 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.<br><br>• 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.<br><br>• If the way of providing information about coastal protection services is to be by vendor disclosure, a vendor will be prevented from providing the information in an alternative (more cost-effective) manner, for example by a special condition in the contract (which would be a feasible method if the topic were dealt with by vendor warranty rather than vendor disclosure).<br><br>• 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 a cooling off period), and will therefore have no effective remedy if the second certificate discloses a coastal protection services charge.<br><br>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.<br><br>The Committee expects it will have input into a detailed submission from the Law Society to the Department of Environment, Climate Change and Water on the Consultation Draft, and proposes to furnish LPMA with |

| Item | Page | Topic Heading | Comments |
|---|---|---|---|
| | | | a courtesy copy of that part of the submission which relates to the Regulation. |

## Annexure B

## The ACT disclosure system

### Introduction

The vendor disclosure provisions in the ACT are contained in the *Civil Law (Sale of Residential Property) Act* 2003 ("the Act") and the *Civil Law (Sale of Residential Property) Regulation* 2004 ("the Regulation"). References in this Annexure to sections and clauses refer to the Act and the Regulation respectively unless the contrary is indicated.

### The legislative scheme

The key vendor disclosure provisions are in Part 2 of the Act. Section 7 introduces, among other things, the concepts of:

- Building and compliance inspection report ("BCIR")
- Building conveyancing inquiry documents
- Lease conveyancing inquiry documents
- Pest inspection report

Each of these categories is defined by prescription; a detailed definition of each appears in clauses 7 to 10 of the Regulation. The BCIR and pest inspection report are defined by reference to an Australian Standard – AS 4349.1 (*Inspection of buildings – Pre-purchase inspections – Residential Buildings*) and AS 4349.3 (*Inspection of buildings – Timber pest inspections*) respectively. Each is required to be attached to the contract for sale of a residence, except in certain limited circumstances, for example:

- The BCIR and building conveyancing inquiry documents are not required for most strata properties, new residences and off-the-plan purchases (s 9(2)(a));
- Pest reports are not required for most strata properties (s 9(2)(b));
- If the seller cannot obtain any document "after taking all reasonable steps to obtain it", the document does not have to be attached to the contract (s 9(2)(c)).

The BCIR and the pest report must be no more than 3 months old at the time of first advertising or listing of the property. To prevent "inspector-shopping", the vendor must attach any BCIR obtained in that 3 month period, and any pest inspection report obtained in the 6 months before first advertising or listing (s 9(1)(h)).

Section 9(1)(i) and (j) require either a current asbestos assessment report (if available) or an asbestos advice (if the report is not available) to be attached. Each of these documents is defined in the *Dangerous Substances Act* 2004 (ACT), sections 47K and 47J respectively.

There is a prohibition on reports being prepared by an inspector related to the vendor, the vendor's agent or the vendor's lawyer (s 9(3)).

The marketing of a property without the required documents being available for inspection is an offence, attracting a maximum penalty of $1000 for an individual and $5000 for a corporation (s 10(1)). There is also an implied term stating that the required documents form part of the contract (s 11(1)(i)). Interestingly, there does not seem to be anything in the Act or Regulation which gives a purchaser the right of rescission (or for that matter explicitly gives any contractual right to the purchaser) if a required document is not attached to the contract.

Section 18 entitles the vendor to be reimbursed for the cost of (the latest) BCIR and pest report. The section does not appear to restrict reimbursement to a prescribed or reasonable amount; nor does the section indicate the existence of any review or assessment mechanism.

Section 19 overcomes the privity of contract difficulty. The section is in these terms:

> ***Compensation to buyer for false report etc***
>
> *(1) This section applies if—*
>
> *(a) a person buys residential property under a contract; and*
>
> *(b) a statement or report mentioned in section 9 (1) (h) (ii), (iii) or (iv) is made available to the buyer; and*
>
> *(c) the statement or report is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care; and*
>
> *(d) because of that, the buyer incurs loss or expense.*
>
> *(2) The person who prepared the statement or report is liable to compensate the buyer for the loss or expense.*

Part 3 of the Act deals with energy efficiency ratings. The advertising of residential premises without stating the energy efficiency rating of the habitable part of the premises (or misstating the correct details in a material particular) is an offence (s 20)). Section 23 provides that the vendor must give an energy efficiency rating statement ("EERS") to the prospective buyer (for example, by attaching it to the contract) and receive written confirmation from the purchaser that he or she has received it (for example, by an acknowledgement in the contract). If the vendor fails to comply, the seller must pay 0.5% of the price to the purchaser (s 23(3)).

The parties cannot contract out of the Act (s 36).

If a person knowingly or recklessly makes a statement or omission in a EERS, a BCIR or a pest inspection report which makes the report materially false or misleading, they commit an offence with a maximum penalty of $50,000 - $10,000 if not a corporation (s 37). Giving a false or misleading document to someone else is likewise an offence (s 38).

## The practice in the ACT

The Committee has made informal inquiries from a number of practitioners about how the ACT system operates in practice. The responses indicate that, for a "typical" transaction:

- The cost to the vendor of obtaining title and zoning material is of the order of $200.
- The cost of obtaining a BCIR and pest inspection report (paid by the vendor but recoverable by the purchaser) is of the order of $800 to $900.
- Where the property is strata title, the vendor incurs a further cost which could range between $88 and $400, of which $88 is recoverable from the purchaser.

- Where a building report is to be updated, the cost of doing so is $300. The statute does not deal with the issue of who bears the cost of updating the report – one practitioner indicated that "usually there is a squabble but the purchaser pays a 'standard 1 off' amount – balance is absorbed by the seller". The Committee notes that in one contract it sighted there were three "very strong recommendations" that an update be obtained rather than relying on the report attached to the contract.

The Committee observes that there a number of significant differences between the ACT and NSW titling and conveyancing systems:

- As title in the ACT is historically leasehold rather than freehold, there have been more effective controls over the construction of improvements (including records of approvals) in the ACT than is the case in NSW.

- Because the founding of the ACT occurred later than the settlement of NSW, the documentary history of a property is more likely to be available in the ACT – records in NSW are more prone to loss or destruction. The "tradition" of effective record-keeping in the ACT is exemplified by the requirement that information about preparation of a BCIR and pest inspection report is to be kept in a publicly available government register (cl 12).

- The number of government authorities which regulate building works in the ACT is far fewer than exist in NSW. It is understood that for most parts of the Territory, there is effectively a single regulator, ACTPLA. By contrast, NSW has in excess of 140 local councils, each with their own slightly different procedures, and numerous other government authorities regulating building work (the Discussion Paper itself identifies several departmental stakeholders; the Committee's response mentions others, for example WorkCover).

- The comparative area of the two jurisdictions means that the obtaining of expert quality reports is easier and cheaper in the ACT than would be the case in many parts of NSW.