



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: Property JD:GL: 744173

13 June 2013

The Hon. Don Page MP  
Minister for Local Government  
Level 33, Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

By email: [office@page.minister.nsw.gov.au](mailto:office@page.minister.nsw.gov.au)

Dear Minister,

**Swimming Pools Amendment Act 2012 ("Amendment Act")**

Thank you for your letter dated 13 February 2013 which provided clarification to the Law Society's Property Law Committee ("Committee") in respect of the consequential amendments made by the Amendment Act to the *Conveyancing (Sale of Land) Regulation 2010* and the *Residential Tenancies Regulation 2010*. The Committee notes your response that the consequential amendments are intended to apply to lot owners of strata or community title where a swimming pool is located on common or association property respectively.

Your response also mentions that consultation will occur between the Division of Local Government and the Department of Finance and Services in respect of the Amendment Act's impact upon the sale and lease processes for strata and community title properties. The Committee would be very pleased to participate in the consultation as you suggest. The Committee notes that the consequential amendments are due to commence in April 2014.

The Committee has a number of concerns regarding the impact and operation of the consequential amendments which include:

**1. Sales and leases process for strata title property**

For sales and leases, must an owners corporation provide a copy of the relevant certificate to a lot owner, and if so on what terms? For example, can a fee be charged by the owners corporation? When must a copy be supplied? The required documentation will either be a valid certificate under the *Swimming Pool Act 1992* ("Act") or an occupation certificate plus evidence of registration under the Act. A vendor or landlord will need to make enquiries with the owners corporation regarding three possible forms of documentation. The Committee supports regulating the time frame and cost of supply of copy certificates by an owners corporation. The Committee also suggests:

- (a) Regulations for the supply of certificates should refer to both possibilities as the applicant will not necessarily know which certificates are available.

- (b) Supply within seven days should be manageable for the owners corporation, noting that s 109(7) of the *Strata Schemes Management Act 1996* requires the owners corporation to give a s 109 certificate within 14 days and a s 109 certificate requires preparation rather than simply copying.
- (c) The fee for supply of the certificate(s) should be prescribed, perhaps by additional items to fees listed in Schedule 1 of the *Strata Schemes Management Regulation 2010* and Schedule 2 of the *Community Land Management Regulation 2007*.
- (d) Additional provisions could be inserted into the *Strata Schemes Management Act 1996* and the *Community Land Management Act 1989* enabling a lot owner or person authorised by the lot owner to apply to the owners corporation (or relevant association) on payment of the prescribed fee. The Committee further notes the current reform of strata legislation may provide an opportunity for suitable amendments to be made.
- (e) The time frame for a response by the owners corporation that no such certificates are held should also be stipulated, preferably also seven days.

The Committee is also concerned that the prescribed vendor disclosure document under Schedule 2.2 of the Amendment Act (and a requirement built into the prescribed form of residential tenancy agreement) can "cease to be valid" if a s 23 direction issues. (Refer page 3, line five of the Explanatory Note). How will a vendor know if a s 23 direction has issued making invalid what appears to be a valid certificate? This is clearly problematic.

## **2. Sale process**

Given the proposed requirement on sale for a prescribed document, arguably the Swimming Pools Warning, which is currently prescribed under Item 15 of the *Conveyancing (Sale of Land) Regulation 2010*, is otiose and should be deleted. This consequential amendment is absent from Schedule 2.2 of the Amending Act.

## **3. Lease process**

The amendment to the prescribed form of residential tenancy agreement contemplates a new clause 40A that the landlord agrees to "ensure" registration of the pool and the existence of a valid certificate of compliance or a relevant occupation certificate. In the Committee's view it is unclear as to how a lot owner will do this. Is there power to compel the owners corporation to register the pool?

## **Issues raised by Land and Property Information ("LPI")**

The Committee is also aware that a number of issues relating to the interpretation and operation of the Act, have been raised informally by officers of LPI with officers of your Department. The Committee strongly agrees with LPI that it is crucial these issues, as set out below, be clarified to ensure that the regime introduced by the Act does not unduly restrict or delay the conveyancing process for the sale of land.

## **4. Section 3- Definitions**

Strata and Community Schemes: Section 3 (1A) of the Act states:

For the avoidance of doubt, a swimming pool is situated on premises in which another building is located if the swimming pool is ancillary to that other building, regardless of whether the swimming pool is on a separate lot, such as on common property under a strata scheme.

It is not clear how the legislation applies to strata and community schemes. Guidelines identifying what premises are required to comply should be issued. For example, in a multi-tiered community scheme, a lot owner may be entitled to use more than one pool, one pool in the subsidiary scheme and another in the community association property. Does a certificate of compliance need to be attached for each pool? The word "ancillary" as used in the section adds to the uncertainty. Clarification as to how the amendments capture strata and community schemes is important, particularly after comments made by Mr David Shoebridge in the Third Reading Parliamentary debate, where it was stated:

...there is no requirement to provide certification for a swimming pool that is located on common property.

Other specific examples of where the operation of this definition is unclear include:

- (a) Easement for use of neighbouring pool: A further difficulty arises in circumstances where land has the benefit of an easement for use of a swimming pool on (usually) neighbouring land. In these circumstances, the benefitted owner has the legal right to access the swimming pool on another property. As such easements are recorded on the title of the land. Pursuant to s 3(1A) the appurtenant land would need to supply a Certificate of Compliance to a contract of sale, without being the owner of the land on which the pool is situated. For the land owner with the benefit of the easement there is no provision that entitles the owner to require the neighbouring land to obtain and provide a Certificate of Compliance. There is no such provision in the Act to overcome this.
- (b) No right to compel an owner to obtain a Certificate of Compliance: The difficulty is not unique to easements for the use of swimming pools, and can also arise in staged strata schemes or mixed-use strata schemes where facilities such as swimming pools between the schemes are shared. There is no provision for the owner of a lot to compel another scheme to register the swimming pool or supply a Certificate of Compliance, despite an easement or by-law that grants rights for use of a swimming pool situated on other premises. Shared facilities for lots in community schemes may also encounter the same inconveniences.
- (c) Sale of a utility lot in a strata scheme: On the assumption that the recent amendments are intended to extend to strata and community schemes, does a contract for the sale of a utility lot require a Certificate of Compliance, where general access to a swimming pool is denied?

## **5. Section 4- Swimming Pools to which the Act applies**

Section 4 of the Act states:

This Act applies to swimming pools (both outdoor and indoor) that are situated, or proposed to be constructed or installed, on premises on which a residential building, a moveable dwelling or tourist and visitor accommodation is located, but does not apply to swimming pools that are situated, or proposed to be constructed or installed, on any premises occupied by the Crown or by a public authority.

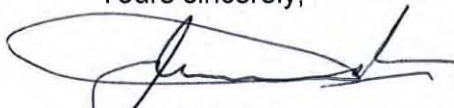
Specific examples of where the operation of this section is unclear include:

- (a) Crown leases of waterfront premises: Does the exemption under s 4 to premises occupied by the Crown or a public authority extend to pools situated on waterfront crown reserve over which the adjoining land has a crown lease?
- (b) Off-the Plan purchase: Section 4 applies to swimming pools "that are situated, or *proposed to be constructed or installed*". It is unclear how this applies to sales for strata or community lots with proposed swimming pools that have yet to be issued with an occupation certificate, but have been proposed in architectural diagrams such as the case with off-the plan sales. Do the amendments extend to off-the plan strata and community schemes, where the swimming pool is yet to be erected or installed? Clarity with respect to when a swimming pool is "proposed" is required as a vendor cannot obtain a Certificate of Compliance for a swimming pool that does not exist.
- (c) Contracting out: There is no facility to contract out of the requirement. Where a residence with a pool is being bought for development a Certificate of Compliance will be required, even where the pool is to be demolished.

The above list of issues is not exhaustive. It is imperative that both vendors and purchasers are adequately advised of their additional rights and obligations in complying with the new provisions of the Act, because of the rescission rights which follow from the failure to include a prescribed document under the *Conveyancing Act 1919* in a contract for the sale of land.

As mentioned, the Committee would welcome the opportunity to be involved in further consultation on these and related issues. Queries about this letter or arrangements for further consultation should be directed to Gabrielle Lea, Policy Lawyer for the Property Law Committee on (02) 9926 0375 or by email to [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au).

Yours sincerely,



John Dobson  
**President**