THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC/RIC/EPD:GUgl1202867

18 October 2016

Conveyancing Review
Office of the Registrar General
Level 3, Records Wing
1 Prince Albert Road
Queens Square
SYDNEY NSW 2000

By email: ORG.Admin@lpi.nsw.gov.au

Dear Sir/Madam,

Review of the *Conveyancing (Sale of Land) Regulation 2010* and the Conveyancing Process in New South Wales ("Discussion Paper")

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper issued for the statutory review of the *Conveyancing (Sale of Land) Regulation 2010* ("Regulation").

Our comments in relation to the specific questions raised in the Discussion Paper are set out in the attached table.

In the course of reviewing the Discussion Paper, the Law Society discussed two additional matters in relation to conveyancing practice generally.

1. Subdivision and redundant easements and covenants

Schedule 1 of the Regulation sets out the prescribed documents for a contract for the sale of land and includes copies of all documents creating all recorded easements, restrictions and other relevant affectations. Members noted that the size of contracts is often unnecessarily increased by the need to attach copies of documents relating to redundant easements, covenants and restrictions which affected the title prior to subdivision. These documents are of historical relevance only, with no current application. Sometimes duplication also occurs, where the same restriction has been replicated several times in the subdivision process. It is good practice to review the currency and relevance of easements, covenants and restrictions in the process of a subdivision, but often this does not occur.

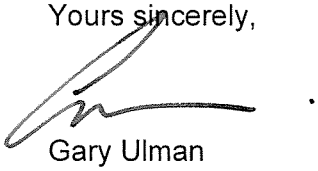
The Law Society considers that when a new plan of subdivision is prepared, all recorded easements, covenants and restrictions should be reviewed for currency and removed if no longer appropriate.

2. The SIX Maps Platform

Our members consider that the SIX Maps platform, LPI's spatial viewing tool, is very useful in identifying the boundaries of land in the conveyancing process. We suggest that the SIX Maps platform could be enhanced to allow practitioners to select multiple lots to be highlighted on one screen, to better facilitate this process when dealing with multiple lot properties.

We note that the Regulation is due to be remade on 1 September 2017, and we would be pleased to be involved in the drafting of any significant changes to the Regulation. Any questions in relation to this letter should be directed to Gabrielle Lea, Policy Lawyer, on 9926 0375 or email: Gabrielle.Lea@lawsociety.com.au.

Yours sincerely,



Gary Ulman
President

Review of the Conveyancing (Sale of Land) Regulation 2010 and the Conveyancing Process in New South Wales – Discussion Paper

Submission by the Law Society of NSW – October 2016

No.	Questions	Comments
2.	**OBJECTIVES OF THE REGULATION**	
1.	Is the Regulation achieving its objectives?	Broadly yes.
2.	If not, why not: what practice issues have you encountered that demonstrate that the Regulation is not meeting its objectives?	• At present the legislation does not adequately deal with electronic exchange of contracts. • In relation to rural conveyancing, we query whether the potential for further streamlining could be explored. For example: o are the current warranties sufficient for rural properties; o where there are multiple parcels of land, could certain inefficiencies be better addressed; and o could more resources be applied to improving the cadastre?
3.	**VENDOR DISCLOSURE**	
3.2.1	**Prescribed documents**	
A.	***Pest and Building Inspection Reports***	
3.	Should there be an obligation on the vendor to disclose patent defects and issues relating to the condition of the property (as well as latent defects in title)?	• We do not support an obligation on the vendor to disclose patent defects of the property and issues relating to the condition of the property. The principle of caveat emptor should continue to apply for patent detects for a number of reasons, including that patent defects may involve a subjective element.

No.	Questions	Comments
4.	Should vendors be required to supply pre-purchase reports to contracts for the sale of land for all property sales at auctions?	No. The Law Society notes the recent changes made by clause 33A of the *Property Stock and Business Agents Regulation 2014* in relation to the disclosure of certain details of existing pre-purchase reports to parties requesting a copy of the contract. We suggest no further changes should be made until the effect of these new provisions can be evaluated.
5.	Should a purchaser be able to sue the author of the report if it is incorrect or negligent?	• Given the response we provided to question 4, this issue does not arise. However if vendors were required to supply pre-purchase reports, a purchaser should not be able to sue the author/report provider unless specific contractual arrangements are entered into between the author/report provider and the purchaser. • Such a proposed change also raises a number of issues such as the effect upon inspectors' professional indemnity insurance and premiums, the lack of licensing of inspectors and the confidentiality of reports. • We note the approach adopted in the ACT and the specific legislative provisions which have the effect of circumventing the privity of contract issue. However we do not support adopting the ACT approach for a number of reasons including: o purchasers in the ACT often obtain their own independent reports; and o the scale of the property market in the ACT, and the size of the ACT, is considerably smaller.
6.	Should the various compliance matters (e.g. window locks, balcony safety, blind cord compliance) be included as mandatory matters to be covered in building reports?	No. Due to the diversity of buildings and access constraints, we do not believe it would be appropriate to prescribe these items as mandatory matters.
B.	***Strata Record Inspection Report***	
7.	Should a strata record inspection report be a prescribed document (giving a	• No. We note that the recent changes made by clause 33A of the *Property Stock and Business Agents Regulation 2014*, referred to above, include strata record

No.	Questions	Comments
	purchaser a right of rescission if the document is not attached to the contract for sale)?	inspection reports. No further changes should be made until the effect of these new provisions can be evaluated. • We also note that strata record inspectors are not regulated and that there are differences in the strata inspection reports currently available. Some reports make a fairly detailed analysis of the minutes of meetings of the owners corporation, while others focus largely on the financial state of the owners corporation. • A strata record inspection report would not be appropriate for a contract for the sale of an off-the-plan strata property.
8.	Do purchasers find the strata report inspection report reliable? Are there circumstances where the report is not considered useful?	• Purchasers generally find a strata records inspection report quite useful and reliable, unless the strata records are not well kept or difficulties are encountered in accessing all of the records. The Law Society hopes that changes to strata legislation due to commence on 30 November 2016 will assist with the better accessing of strata records. • We note that the report is not as useful for schemes comprising only two lots or off the plan developments. • Although we do not support a strata record inspection report being a prescribed document, if it were to be prescribed, the mandatory content of such a report should also be prescribed.
C.	***Sewerage location diagram***	
9.	Should it be mandatory for a sewerage reference diagram (if available) to be a prescribed document?	Yes. We note that it is now generally regarded as prudent practice to attach both a Sewer Service Diagram and a Service Location Print to the contract.
10	What has been your experience when dealing with locating the authority's	• Members have had varied experiences where the diagrams are inaccurate, out of date or processes have broken down such that diagrams have not been updated at

No.	Questions	Comments
	sewer?	the time works were done. • As mentioned in the Discussion Paper, ideally the previous standards that applied before changes were made in 2009 should be reinstated to make the diagrams more reliable.
11.	Are the new diagrams useful in any way? Should they not be a prescribed document if they cannot be relied on?	Recently issued documents have very limited utility unless they make the required disclosure.
3.2.2	**Warranty in contract**	
A.	***Proposed demolition orders by council***	
12.	Should the vendor warrant that he or she has not received a proposed order from council for the demolition or upgrading of a building on the land?	• No. The Law Society's preferred position is for this matter to be dealt with in s 149(2) certificates. The relevant local Council is best placed to specify whether it has issued a proposed order for the demolition or upgrading of a building on the land which has not been complied with. We note that the City of Sydney Council already specifies this information in the certificates it issues under s 149(5). • Additionally a purchaser should be able to rely on the information provided in a s 149(2) certificate as if a certificate had issued under s 121ZP of the *Environmental Planning and Assessment Act 1979* and s 735A of the *Local Government Act 1993*.
13.	Are there any other matters which the vendor should warrant or disclose regarding matters involving demolition or upgrading of buildings or structures on the land?	If the suggestion in question 12 is pursued, we suggest the provisions should also be extended to proposed and current direction notices issued by Councils under s 23 of the *Swimming Pools Act 1992*.
B.	***Order for adequate fire safety***	

No.	Questions	Comments
14.	Should the vendor warrant that the property is not subject to an order for fire safety awareness?	No. The Law Society's preferred position is for this matter to be dealt with in s 149(2) certificates. Again the relevant local Council is best placed to provide the necessary information.
15.	Should a fire safety order be a matter for disclosure in a section 149(2) certificate?	Yes, for the reasons referred to above.
C.	***Mine subsidence issues***	
16.	Should the Regulation deal with mine subsidence issues, or does the present scheme operate satisfactorily?	• We consider that the Regulation should deal with mine subsidence issues rather than continuing with the present scheme. Section 15(5) of the *Mine Subsidence Compensation Act 1961* should be repealed and adopted in the Regulation. This will bring consistency to the remedies available to the purchaser in relation to the breach of prescribed warranties concerning adverse affections. Clause 16(3) of the Regulation limits rescission rights to the following circumstances: 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. However s 15(5) of the *Mine Subsidence Compensation Act 1961* allows a purchaser to terminate the contract without the above qualifications and recover the deposit, any amount paid and legal costs. • Additionally the above rights under the *Mine Subsidence Compensation Act 1961* are not widely known and it would be useful to have these rights and remedies

No.	Questions	Comments
		included in the Regulation.
17.	If the Regulation is to deal with mine subsidence, should this be as a prescribed warranty, prescribed document or otherwise?	The Law Society's preferred position is for this matter to be dealt with as a prescribed warranty.
D.	***Loose-fill Asbestos Insulation***	
18.	Should the Regulation deal with the possible existence of loose-fill asbestos insulation?	• Yes. We suggest a warning would be appropriate. • We note that at present a s 149(2) certificate will disclose whether a property is listed on the Loose-fill Asbestos Insulation Register.
19.	If included in the Regulation, should the existence of loose-fill asbestos insulation be the subject of a vendor warranty, warning notice or dealt with in some other way?	A general warning is appropriate. At present many vendors will be unaware whether or not their property is affected by loose-fill asbestos insulation, making it difficult to make this the subject of a vendor warranty.
3.2.3	**Expanding complexity of the contract**	
20.	Does each document currently required to be attached to the contract provide useful and important information for prospective purchasers to be able to make informed choices? If not, why not?	Yes, subject to our comments in response to question 40.
21.	Should any document be removed from the list of prescribed documents? Should this relate to all sales or just for residential or commercial properties?	In our view no document should be removed from the list of prescribed documents. This applies for all sales, including both residential and commercial.

No.	Questions	Comments
22.	Are there any circumstances in which contracts should be exempt from attaching the prescribed documents (for example, small parcels of crown land sold to adjoining landowners who may already be utilising the parcel)?	No, the existing exemptions are sufficient.
23.	Should the Regulation provide an alternative, electronic means of providing the prescribed documents? How might this be best achieved?	• Yes the Regulation should provide an alternative, electronic means of providing the prescribed documents. However electronic disclosure should only be available where the contract is to be executed electronically and formed electronically. • This would best be achieved by providing in this Regulation that disclosure in electronic form is sufficient. In such situations, the Law Society does not support providing the prescribed documents partially by electronic means and partially in hard copy.
24.	Have you exchanged contracts electronically with the use of digital signatures? Is this a beneficial practice? Were there any challenges in this process?	• We believe that electronic exchange of contracts should be facilitated and this is consistent with electronic disclosure. • A number of practical challenges are raised by the electronic exchange of contracts which should be further resolved, including; o whether electronic disclosure satisfies the requirements in relation to minimum font size for certain statements under subclauses 11(2) and 14(2) of the Regulation and warnings under Schedule 1, Item 15 of the Regulation; o the stamping of an electronic contract; and o whether a paper copy of the contract should be made.
4.	**ISSUES ARISING IN OFF-THE-PLAN CONTRACTS**	
4.1	**Contractual Disclosure**	

No.	Questions	Comments
25.	Is there any need for the law to address disclosure in off-the-plan sales? What issues have you encountered that were not covered in the contract for the sale of land but should have been disclosed in the contract?	No. The main issues that members are aware of are construction issues concerning changes to the layout. Normally these arise from practical difficulties in construction and are to a large degree unavoidable.
26.	Should the by-laws be disclosed in the contract for sale for off-the-plan strata units?	We note that normally by-laws are disclosed and we consider this should be a requirement of the Regulation provided the vendor is able to make any changes to the by-laws that may be required by the local Council and other regulatory bodies.
27.	Should an estimate of future levies be included in the off-the-plan contract?	No.
28.	Should a disclosure statement similar to those in Queensland be required to be attached to off-the-plan contracts?	No.
4.2	**Cooling off Period**	
29.	Is the standard 5 day cooling off period sufficient in off-the-plan sales? Should this be extended, and if so what time frame is appropriate for such contracts?	We suggest 10 business days would be appropriate.
30.	Should there be any change to the amount a purchaser forfeits when exercising cooling off rights under an off-the-plan contract?	No.
4.3	**Sunset Clauses**	
31.	Have you experienced situations where a developer sought to terminate the	Yes. The addition of s 66ZL of the *Conveyancing Act 1919* has made an impact.

No.	Questions	Comments
	contract under a sunset clause? Has the addition of s 66ZL of the *Conveyancing Act 1919* made an impact on this practice?	
32.	Are there circumstances in which a vendor should be able to terminate the contract under a sunset clause without the purchaser's consent and without a court order? Why?	No.
33.	Is s 66ZL achieving its objective? If not, why not?	Yes.
4.4	**Other Off-the-Plan Issues**	
34.	Is there any need for the law to intervene in circumstances where the vendor seeks to make changes to the proposed lot or building after exchange of contracts, even if such conduct is permitted by the Contract?	No.
35.	Have you experienced any other issues in off-the-plan conveyancing which could have been resolved through legislative intervention?	No.
5	**SWIMMING POOL CERTIFICATION REGIME**	
36.	Should the Warning Notice be amended to refer to the purchaser's obligation to make a pool compliant within 90 days of settlement?	No. See our response to question 40.

No.	Questions	Comments
37.	Have you experienced any issues with the introduction of the certification regime and the new prescribed documents which require consideration in the review of the Regulation?	• Yes, and there are also inconsistencies with the information provided on the swimming pool registry website and the requirements introduced by Schedule 1 Item 14A of the Regulation. • One issue requiring clarification is the validity of certificates of non-compliance issued by private certifiers, on their letterhead, outside the Swimming Pool Register. Information on the swimming pool registry website indicates that certificates of non-compliance are only valid when issued from the NSW Swimming Pools Register. However clause 18BA of the *Swimming Pools Regulation 2008* simply requires an inspector to issue the certificate of non-compliance in the form approved by the Chief Executive of Local Government and contain the information set out in the *Swimming Pools Regulation 2008.* This Regulation does not contain any reference to recording the information in relation to a certificate of non-compliance on the Swimming Pool Register, as applies for a certificate of compliance under s 22D of the *Swimming Pools Act 1992.* Given the consequences that may flow from the failure to attach a valid certificate of non-compliance, it is important that clarity be provided as to whether a certificate of non-compliance generated outside the Register is valid. • Another issue requiring clarification is the application of the exemption for strata and community schemes of more than 2 lots where the pool or spa pool is located **within** a strata or community lot. In our view, an analysis of Schedule 1 Item 14A (2) of the Regulation indicates a complete exemption of the prescribed documents under Item 14A(1), for strata and community schemes of more than two lots. This would capture both pools located within the lot and pools located on common property. It would be helpful if the extent of the exemption was further clarified.
6.	**OTHER IMPROVEMENTS IDENTIFIED BY THE COMMITTEE**	
38.	Do you oppose any of the changes identified by the Committee above, and if so, why?	• The Law Society does not support the proposal outlined in part 6.1 of the Discussion Paper in relation to a single s 149 certificate only being necessary for the sale of certain rural properties.

No.	Questions	Comments
		• The proposal is attractive from the perspective of reduction in the size of the contract, removing duplication and the significant costs in obtaining multiple s 149 certificates. This is particularly the case where the relevant Council insists upon issuing s 149 certificates on a per lot basis only. • However the proposal also needs to be considered in the context of the prescribed warranties in Schedule 3 of the Regulation. Part 1, clause 1 of Schedule 3 states: 1. The vendor warrants that, as at the date of the contract and except as disclosed in the contract: ..... (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.....: In the sale of a property comprised of multiple lots, attaching a s 149 certificate for only one of the subject lots may lead to the vendor inadvertently breaching this prescribed warranty and allowing the purchaser to rescind the contract in accordance with clause 16 of the Regulation at any time prior to settlement. In our view, the consequences of not disclosing the true status of the subject property outweigh the benefits of the proposal. • Anecdotally, we understand that Councils often cite the reference to 'lot' in clause 1 of Schedule 1 as the basis for issuing s 149 certificates on a per lot basis. We suggest that it would encourage Councils to issue a s 149 certificate on a multiple lot basis (where appropriate) if the word "lot" was amended to read "land". This change would also be consistent with the terminology used in s 149(1) of the *Environmental Planning and Assessment Act 1979*. This amendment is suggested as an alternative to the proposal outlined in part 6.1 of the Discussion Paper. • It would also be of significant benefit if Councils were encouraged to provide s 149 certificates on a multiple lot basis, particularly when often the Council assesses the

No.	Questions	Comments
		property on a multiple lot basis. Historically, upon receipt of a request for a s 149 certificate for a rural property, a Council would issue a single certificate and note on the front page of that certificate, the lots comprising the property. Increasingly this no longer appears to be the practice.
39.	Are there any other improvements to the Regulation which you would like the Committee to know about?	No.
7.	**FINAL QUESTIONS**	
40.	Should any of the existing compulsory annexures to the contract for the sale of land be removed or modified?	We suggest that consideration should be given to streamlining the various warnings in relation to smoke alarms, swimming pools etc.
41.	Should there be any changes to the existing prescribed warranties?	In our view, the existing prescribed warranties are sufficient except for further changes that may be necessary due to the new strata renewal process. Consideration should be given to a adding a new warranty to Schedule 3, Part 1, clause 1 of the Regulation that the owners corporation has not established a strata renewal committee under Part 10 of the *Strata Schemes Development Act 2015.*
42.	Should there be any changes to the existing implied terms and prescribed terms?	No.
43.	Should there be any changes to the existing purchasers' remedies?	No.
44.	Are there any other documents that should form part of the review that are not discussed in this paper?	We suggest that the vendor of rural lands should be required to attach a Crown lands search which sets out particulars of enclosure permits and Crown leases that attach to the lands.

No.	Questions	Comments
45.	Any other considerations that should be taken into account?	• In our view there should be some consideration given to the impact of the strata renewal process under Part 10 of the *Strata Schemes Development Act 2015.* One approach may be the new warranty suggested in response to question 41. • The Law Society notes there have been a number of cases identifying issues with the operation of vendor disclosure and warranties in the context of options. These matters mainly relate to the operation of the provisions of the *Conveyancing Act 1919.* • Item 10 of Schedule 4 of the Regulation uses the term "residential land", yet this is not a defined term. The term "residential property" is defined in s 66Q of the *Conveyancing Act 1919.* This reference should be reviewed.