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# *Draft Conveyancing (Sale of Land) Regulation 2022*

## The Real Estate Institute of New South Wales Limited

## Submission in response to the draft proposed *Conveyancing (Sale of Land) Regulation 2022* (NSW)

## 14 July 2020

**TO:** **Ms Amy Stiles, Managing Lawyer (Policy & Legislation)**
**Office of the Registrar General**
**McKell Building**
**Level 7, 2-24 Rawson Place**
**Sydney NSW 2000**

**By email: amy.stiles@customerservice.nsw.gov.au**

# 1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the draft proposed *Conveyancing (Sale of Land) Regulation 2022* (NSW) (**Draft Conveyancing Regulation**) which is currently open for public consultation.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

This submission sets out issues and recommendations for the Office of the Registrar General to consider when reviewing the Draft Conveyancing Regulation and its effectiveness in practice.

# 2. Material Facts and Asbestos Registrar

On 16 June 2022, REINSW took the initiative to prepare a submission in relation to the *Conveyancing (Sale of Land) Regulation 2017* (NSW) (**Current Conveyancing Regulation**), which is to be expected to be remade on 1 September 2022 (**Conveyancing Regulation Review Submission**). REINSW was aware that the Office of the Registrar General was reviewing this piece of legislation, and wanted to use this opportunity to provide some comments which it hoped would be of assistance to Government in this process.

In the Conveyancing Regulation Review Submission, REINSW recommended that the Office of the Registrar General include a provision in the Conveyancing Regulation requiring mandatory disclosure by the vendor to the purchaser in the contract for sale of any material facts which might affect a property, including whether a property is listed on the New South Wales Loose-Fill Asbestos Register (**Asbestos Register**). REINSW also recommends that any mandatory disclosures of such material facts be included as prescribed warranties in the contract for sale, akin to the warranties in the contract in Part 1 of Schedule 3 to the current Conveyancing Regulation.

The Draft Conveyancing Regulation does not appear to include the recommendations made by REINSW in its Conveyancing Regulation Review Submission, which REINSW **encloses** as Annexure A. REINSW would also like to draw the Office of the Registrar General's attention to REINSW's Submission on the Discussion Paper Review of the *Conveyancing (Sale of Land) Regulation 2010 (NSW)* and Conveyancing Process in New South Wales dated 11 October 2016 (**enclosed** as Annexure B) and REINSW's Submission on the Draft Discussion Paper – Review of the *Conveyancing (Sale of Land) Regulation* dated 10 September 2015 (**enclosed** as Annexure C) – both of which also raise this issue relating to vendor disclosure of material facts.

As these submissions show, this has been a perennial issue of importance for the real estate industry which REINSW has raised over many years and which is one that has not been resolved. For the reasons given in the submissions enclosed and for those set out in this submission below, REINSW feels that it is imperative that a provision requiring disclosure by a vendor to a purchaser of any material facts should be included within the new Conveyancing Regulation and it requests that the Office of the Registrar General considers REINSW's previous submissions on this subject as part of this review.

The issues, and reasons for including such an obligation is explained at length in the annexed submissions to which we refer the Office of the Registrar General. However, in summary, REINSW believes that its proposed provision would be of benefit because:

a) Real estate agents are obliged to disclose material facts about a property (including pursuant to a non-exhaustive list set out in clause 54 of the *Property and Stock Agents Regulation 2014* (NSW) (**PSA Regulation**)) pursuant to section 52 of the *Property and Stock Agents Act 2002* (NSW), however, a vendor has no such obligation.

b) The lack of disclosure obligations on vendors creates consumer protection issues. It also impacts the relationship between real estate agents (who have such a duty to disclose material facts to the purchaser) and the vendor, as real estate agents can only disclose such information to the extent that they have been informed of material facts by the vendor in the first place, or where the material fact may be apparent from an inspection of the property, many of which are not.

For these reasons, and those set out in Annexure A, REINSW recommends that the Office of the Registrar General insert into the Draft Conveyancing Regulation a provision requiring mandatory disclosure by the vendor to the purchaser of any material facts which might affect a property, including whether a property is listed on the Asbestos Register.

## 3. Conclusion

REINSW has considered the Draft Conveyancing Regulation and has provided its comments above, aiming to provide input on as many pertinent aspects of the Draft Conveyancing Regulation as possible. However, REINSW's resources are very limited and, accordingly, it does not have the capacity to undertake a thorough review and is unable to exhaustively investigate all potential issues in this submission. Nonetheless, REINSW has identified a number of matters that it believes will cause significant consumer detriment, some of which appear above.

REINSW appreciates the opportunity to provide this submission and would be pleased to discuss it further, if required.

Yours faithfully

Tim McKibbin
**Chief Executive Officer**

# Annexure A

The following pages include REINSW's Submission - Review of the *Conveyancing (Sale of Land) Regulation 2017* (NSW) dated 16 June 2022

16 June 2022

Ms Amy Stiles
Managing Lawyer (Policy & Legislation)
Office of the Registrar General
Department of Customer Service

**By email: amy.stiles@customerservice.nsw.gov.au**

Dear Ms Stiles,

**Submission – Review of the *Conveyancing (Sale of Land) Regulation 2017* (NSW)**

The Real Estate Institute of New South Wales Limited (**REINSW**) understands that Government is currently reviewing the *Conveyancing (Sale of Land) Regulation 2017* (NSW) (**Regulation**) and would like to take this opportunity to provide some comments which we hope will be of assistance in this process. In particular, we request Government consider including a provision in the Regulation requiring mandatory disclosure by the vendor to the purchaser of any material facts which may affect a property, including whether the property is listed on the New South Wales Loose-fill Asbestos Register (**Asbestos Register**). REINSW also recommends that such disclosures be annexed to the contract for sale to ensure the purchaser is clearly aware of this information before signing it.

Although real estate agents are obliged to disclose to purchasers material facts about a property (including pursuant to a non-exhaustive list set out in clause 54 of the *Property and Stock Agents Regulation 2014* (NSW) (**PSA Regulation**)), a vendor has no such obligation under section 52 of the *Property and Stock Agents Act 2002* (NSW) (**PSA Act**). REINSW is of the view that the lack of disclosure obligations incumbent on the vendor creates the following issues:

1. The purpose for disclosing material facts is primarily to protect consumers and to ensure that they are adequately informed of relevant information which may impact their decision to enter into a contract for sale. This is important because a property transaction is likely to be one of the most significant financial decisions that a person makes throughout their lifetime. While purchasers should conduct their own due diligence, sometimes important enquiries can be omitted. Other information may be of a nature which is not readily available through a search or public register. It could be a latent or patent defect or safety issue unique to the property which is not apparent from an inspection, or it could involve information about a previous crime committed at the property. For example, REINSW is aware of one agent who exchanged a property in a strata complex and who was not informed by a vendor of an Emergency Annual General Meeting called to determine a special levy. The agent only found out about it because their agency managed another property in that complex and had received for that particular landlord a notice of the meeting. Imposing a mandatory obligation on the vendor to disclose information of this nature helps purchasers make better informed decisions about whether a property is right for them, when making this large financial investment decision.

2. There is no requirement for a vendor to inform an agent of a material fact, which impedes upon the agent's ability to fully comply with their obligations under section 52 of the PSA Act. In fact, there is actually an incentive for a vendor not to inform the agent of information of this nature as doing so will generally adversely impact the property's value. Not only does this undermine the consumer protection objectives mentioned above, but where a vendor fails to disclose a material fact to an agent, the agent might be at risk of liability under section 52(1)(b) of the PSA Act where they "ought reasonably to [have] know[n]" about it.

3. The current lack of disclosure obligations on the vendor creates a conflict-of-interest between agent's obligations to the vendor and purchaser. It requires the agent to act in their client's best interests while also disclosing to the purchaser material facts. This creates tension between the agent and their client which could be removed where both the vendor and agent were under the same obligation to disclose this information to the purchaser.

REINSW's view is that these issues could be resolved in the Regulation as a mandatory disclosure obligation requiring the vendor to inform purchasers of any material facts affecting the property.

For consumer protection purposes and similar reasons stated in paragraphs 1-3 above, REINSW also recommends that vendors disclose if their property is listed on the Asbestos Register. Although this would also fall within the scope of a "material fact" (should Government agree with REINSW's recommendations on this matter) and there is already a prescribed warning in Item 16 of Schedule 1 to the current Regulation recommending the purchaser search the Asbestos Register and contact their local government about any record of loose-fill asbestos in the property, given the significant health and safety impacts of this material, REINSW's view is that there should also be a specific duty for vendors to disclose this information in the contract for sale if they know the property is on the Asbestos Register.

REINSW recommends that these mandatory disclosures should be included as prescribed warranties in the contract for sale, akin to the warranties in the contract in Part 1 of Schedule 3 to the current Regulation.

For the reasons given in this submission, REINSW would be grateful if Government would consider amending the Regulation on the above basis as we believe it would assist all.

We thank you for your consideration of our submission, we are available to discuss our submission if you wish. Otherwise, we look forward to receipt of your response.

Yours faithfully

Tim McKibbin
**Chief Executive Officer**

# Annexure B

The following pages include REINSW's Submission on the Discussion Paper Review of the *Conveyancing (Sale of Land) Regulation 2010* (NSW) and Conveyancing Process in New South Wales dated 11 October 2016

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# The Real Estate Institute of New South Wales Limited

## Submission dated 11 October 2016

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

**To:**

Conveyancing Review
Office of the Registrar General
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## 1. INTRODUCTION

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Discussion Paper on the review of the *Conveyancing (Sale of Land) Regulation 2010* (NSW) (**Regulation**) and the conveyancing process in NSW.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. It seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in NSW.

This Submission should be read in conjunction with the Discussion Paper because REINSW has chosen to comment only on specific questions, using the same numbering as that used in the Discussion Paper itself.

## 2. ISSUES FOR DISCUSSION

***Question 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)?***

REINSW is of the view that the more relevant information purchasers have in relation to the property, the better their decision in relation to whether the property is suitable for their intended use. The disclosure of both patent and latent defects and other material facts avoids unexpected problems relating to the property and ensures a more efficient conveyancing process that is less costly for all parties involved.

In the interests of consumer protection, prudent purchasers should make certain enquiries as part of their due diligence. However, it is fact that such enquiries are regularly omitted from the process. If these matters are prescribed for inclusion in the contract, then this ensures that they are brought to the purchaser's attention and reduces the likelihood of problems arising during the process.

Traditionally there have been two lines of enquiry for purchasers of real property:

(1) the quality of the title, which can be ascertained by a search of the register at LPI; and

(2) the quality of the structures, which to an extent can be ascertained through a building report.

In recent years, the question of whether a property is "stigmatised" has become increasingly relevant. Section 52(1) of the *Property, Stock and Business Agents Act 2002* (NSW) (**PSBA Act**) states:

> *A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a **material fact** (whether intended*

*or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.* (bold emphasis added)

Therefore, whilst an agent has a duty to act in the best interests of the vendor, the agent also has an obligation to disclose to a purchaser any stigma or "material fact" pertaining to the property. There is no corresponding obligation on the vendor.

Imposing these disclosure obligations only on the agent results in several concerning, but probably unintended, consequences, including (without limitation):

(a) the intent of ensuring consumer protection is not met, as there is no obligation on the vendor to inform the agent or the purchaser of any stigma or material fact;

(b) it is not in the interest of the vendor to make these disclosures as the price purchasers are willing to pay may be adversely affected;

(c) it creates a tension in the relationship between the vendor and the agent;

(d) there is a potential conflict for the agent in cases where the agent is instructed by the vendor not to disclose certain matters to prospective purchasers – if the agent makes the disclosure as required under the PSBA Act, the vendor may sue the agent; and

(e) the agent may become liable for non-disclosure in instances where the vendor has not made the agent aware of those matters in the first place.

Matters that comprise latent or patent defects could constitute a material fact and could stigmatise a property. They are matters which the vendor is not obliged to disclose to the agent or purchaser and which may be difficult for a purchaser to discover as part of their due diligence.

REINSW proposes that, in the interest of consumer protection, the following should be addressed in the Regulation:

(i) to ensure consistency for purchasers, there needs to be a mandatory disclosure obligation on the vendor to disclose patent and latent defects and other material facts in relation to the property (in addition to the obligations on the agent under the PSBA Act); and

(ii) to ensure certainty of disclosure, the vendor's disclosure obligations need to be discharged by way of annexing the relevant information in the contract for sale.

In addition to the vendor's mandatory disclosure regime discussed above, REINSW supports (in principle) the introduction of a vendor's statement similar to that required by section 32 of the *Sale of Land Act 1962* (VIC) but with latent and patent defects and other material facts to be included in the statement as prescribed information.

In Victoria, a vendor's statement must be prepared by (or on behalf of) a vendor and served on any person who wishes to purchase the vendor's property *before* the contract of sale is signed. The document informs potential buyers about certain information relating to the

property that they should know before signing the contract and, if the vendor fails to provide the information before exchange, the purchaser can rescind the contract.

REINSW would welcome the introduction of a similar disclosure mechanism in NSW. It would give the vendor a standard process to disclose latent and patent defects and other material facts and would bring these matters to the attention of the purchaser prior to exchange.

***Questions 4 and 7: Should vendors be required to supply pre-purchase reports to contracts for the sale of land for all property sales at auctions? Should a strata record inspection report be a prescribed document (giving a purchaser a right of rescission if the document is not attached to the contract for sale)?***

The Discussion Paper recognises that frequently there is duplication and additional expenses incurred by prospective purchasers in obtaining building and pest reports and strata record inspection reports for a property and then missing out on the purchase.

REINSW agrees with the intention of making it easier and cheaper for prospective purchasers to obtain building and pest inspection reports and strata record inspection reports (the latter applicable where the property is in a strata scheme) (**Pre-Purchase Reports**), particularly if prospective purchasers bear the cost and miss out on buying the property. REINSW does not believe that this problem will be resolved by the new Clause 33A in the *Property, Stock and Business Agents Regulation 2014* (NSW). REINSW believes that the solution is to make Pre-Purchase Reports mandatory annexures to the contract for sale of land. The way to do this is by making them prescribed documents in accordance with section 52A(2)(a) of the *Conveyancing Act 1919* (NSW) and clause 4 of the Regulation. By making Pre-Purchase Reports prescribed documents, purchasers will be put on notice upfront about the costs associated with the strata lot (if applicable), the condition of the property and pest activity in the property they are considering purchasing.

REINSW is of the view that making Pre-Purchase Reports prescribed documents annexed to the contract for sale is essentially legislating what happens in practice on a daily basis. The Government should be aware that, for many years now, a significant number of agents are following what is considered to be best practice. Currently, best practice is for licensees-in-charge to advise vendors to commission and pay for independent pest and building reports before listing the property for sale and to disclose those reports to any person requesting a copy of the contract for sale. Licensees-in-charge find that disclosure of pest and building reports as a matter of course makes the selling process easier, and assists with the appropriate pricing of properties and negotiation between the parties. REINSW proposes that this form of best practice should be reflected in legislation and made mandatory. It would ensure convenience and reliability for purchasers, vendors and licensees and minimal, if any, issues with the property.

Although not discussed in Section 3 of the Discussion Paper, REINSW recommends that the certificate pursuant to section 149(5) of the *Environmental Planning and Assessment Act 1979* (NSW) be a prescribed attachment to the contract. Section 149(5) provides the means for a council to disclose information about relevant matters affecting the land. In practice, only some purchaser's lawyers and conveyancers obtain this certificate after exchange, however, best practice would be to obtain it beforehand so that any issues are brought to the

purchaser's attention before the contract is signed. REINSW is of the view that best practice should be encouraged by making the certificate a prescribed document to the contract.

In addition, research undertaken by the Loose-Fill Asbestos Insulation (**LFAI**) Taskforce supports REINSW's view that the section 149(5) planning certificate should be annexed to the contract for sale. The research determined that there is potential for LFAI to be found in pre-1980 homes in the identified local government areas. A generic alert is recommended for inclusion in section 149(5) planning certificates issued by councils in these local government areas regarding the potential for the existence of LFAI in properties that are not listed on the LFAI Register. This additional information highlights the importance of making the certificate mandatory for the contract for sale.

***Question 5: Should a purchaser be able to sue the author of the report if it is incorrect or negligent?***

REINSW believes that the purchaser should be able to sue the author of Pre-Purchase Reports that are prescribed documents annexed to the contract for sale if they are incorrect or negligent. There is the issue of the common law principle of privity of contract so REINSW recommends there be a legislated mechanism whereby the purchaser can have a right of recourse against the author in respect of the contents of the report, even though commissioned by the vendor or third party.

As the Discussion Paper mentions, this approach already exists in the Australian Capital Territory (**ACT**) by way of the *Civil Law (Sale of Residential Property) Act 2003* (ACT). REINSW supports the introduction in NSW of a similar legislative measure to that in force in the ACT, where the purchaser has a direct right to sue the author if loss is suffered because of negligence or reliance on a materially false or misleading statement or other content in a report. Further, in the ACT, the purchaser is required to reimburse the vendor for the costs of the reports upon completion of the contract. In NSW, the current agent disclosure method is complex and uncertain. REINSW believes that the ACT approach in NSW would effectively resolve the issues associated with potential purchasers having to commission their own Pre-Purchase Reports and, at the same time, would provide purchasers with a right of recourse against the author of the report, even though the vendor or other third party commissioned it.

***Question 6: Should the various compliance matters (eg. window locks, balcony safety, blind cord compliance) be included as mandatory matters to be covered in building reports?***

It is REINSW's position that building reports should be standardised with a prescribed list of matters to be addressed, particularly those that present a risk of injury or hazard to life, including (without limitation):

- asbestos;
- glass safety;
- window safety locks;
- smoke alarm compliance;
- safety and structural integrity of decks and balconies;
- the presence of lead paint;
- electrical installations;
- swimming pool compliance;

- blind cord safety; and
- other hazards located on the property.

The above list comprises the matters which a property manager (with no building expertise or qualification) is required to address when renting a property. It is submitted that this falls more appropriately in the domain of the building inspector.

The benefits of prescribing the areas which a building report must cover ensures that the building inspector turns their attention to the relevant issues and that the parties have a better understanding of the contents of the report.

This approach is consistent with ACT regulation which standardises the minimum content of these reports. REINSW recommends NSW follow suit and standardise the content of reports with a prescribed list of matters to be addressed.

***Questions 18 and 19: Should the Regulation deal with the possible existence of loose-fill asbestos insulation? 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?***

There have been recent amendments to the *Environmental Planning and Assessment Regulation 2000* (NSW) to require that the presence of LFAI in dwellings positively identified through testing or from historical records be listed on the section 149(2) planning certificate issued by council for that property. Further, a generic alert is to be included in section 149(5) planning certificates if a property is not listed on the LFAI Register but is in a local government area identified as having the potential for the existence of LFAI. Since section 149(2) planning certificates must be attached to contracts for sale and REINSW proposes section 149(5) planning certificates should be attached to such contracts, REINSW is of the view that there is no need for the existence of LFAI to be the subject of a vendor warranty or warning notice. Of course, it needs to be in the contract but the purchaser is constructively put on notice about any existence of LFAI by virtue of the prescribed section 149(2) certificate and section 149(5) certificate.

***Question 36: Should the Warning Notice be amended to refer to the purchaser's obligation to make a pool compliant within 90 days of settlement?***

REINSW believes that the Warning Notice in the contract for sale relating to swimming pools should reflect current legislation and, therefore, should be amended to reflect the obligation imposed on the purchaser to rectify any outstanding compliance matters within 90 days of settlement.

***Question 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?***

The feedback REINSW has received in relation to the introduction of the certification regime and the new prescribed documents is that there seems to be a shortage of qualified E1 certifiers and a lack of education and ignorance in the conveyancing environment, despite everyone's best efforts to understand and familiarise themselves with the new regime and prescribed documents.

## 3. CONCLUSION

As abovementioned, REINSW encourages the Government to align the disclosure obligations of vendors to those of agents. That will avoid conflicts of interest that are difficult to manage as well as ensure that purchasers are more likely to be put on notice of all material facts.

REINSW believes a mandatory disclosure regime will give effect to the objective of creating a more efficient and economical regulatory scheme for the buying and selling of residential properties. Attaching the documents discussed in this submission to the contract for sale will enable purchasers to carry out due diligence and to have as much disclosure as possible, ultimately reducing disputes and encouraging an efficient and cost-effective conveyancing process.

REINSW welcomes discussion of the issues raised in this submission with the legal and policy officers at the Department of Land and Property Information.

Yours faithfully

Tim McKibbin
**Chief Executive Officer**
**The Real Estate Institute of New South Wales Limited**

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# Annexure C

The following pages include REINSW's Submission on the Draft Discussion Paper – Review of the *Conveyancing (Sale of Land) Regulation* dated 10 September 2015

REINSW
REAL ESTATE INSTITUTE
OF NEW SOUTH WALES

Mr Robert Goncalves
Senior Solicitor
Legal Services Division
Land and Property Information
Department of Finance, Services and Innovation

10 September 2015 **By email: robert.goncalves@lpi.nsw.gov.au**

Dear Mr Goncalves,

**REINSW Submission**
**Draft Discussion Paper – Review of the Conveyancing (Sale of Land) Regulation**

The Real Estate Institute of New South Wales (**REINSW** or the **Institute**) appreciates the opportunity to contribute to the review of the *Conveyancing (Sale of Land) Regulation* 2010 (**Regulation**) and to provide comments in relation to the contents of the draft Discussion Paper (**Discussion Paper**).

The Institute is the largest professional association of real estate agents and other property professionals in New South Wales. The REINSW seeks to promote the interest of members and the property sector on property related issues. In doing so the REINSW believes it has a substantial role in the formation of regulatory policy in New South Wales.

The REINSW welcomes discussion of the issues raised in this submission with the legal and policy officers at the department of Land and Property Information (**LPI**).

## General

In the interests of consumer protection there are certain things that a prudent purchaser should do as part of their enquiries. If these matters are prescribed for inclusion in the contract, then this ensures that they have been brought to the purchaser's attention.

### *Stigmatised properties (material fact)*

Traditionally there have been two lines of enquiry for purchasers of real property:

- the quality of the title, which can be ascertained by a search of the register at LPI; and
- the quality of the structures, which to an extent can be ascertained through a building report and other similar reports.

In recent years, the question of whether a property is "stigmatised" has become increasingly relevant. Section 52(1) of the *Property, Stock and Business Agents Act* 2002 (**PSBA**) states:

> *A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a* ***material fact*** *(whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.* (bold emphasis added)

An agent has a duty to act in the best interests of the vendor. The agent also has an obligation to disclose to a purchaser any stigma or "material fact" pertaining to the property. There is no corresponding obligation on the vendor.

Imposing these disclosure obligations only on the agent results in several concerning, but probably unintended, consequences:

- the intent of ensuring consumer protection is not met, as there is no obligation on the vendor to inform the agent or the purchaser of any stigma associated with the property;
- it is not in the interest of the vendor to make these disclosures as the price purchasers are willing to pay may be adversely affected;
- it creates a tension in the relationship between the vendor and the agent;
- there is conflict between the consumer protection obligation in the PSBA and the disclosure obligations of the vendor, which are not consistent with the agent's;
- the agent may become liable for non-disclosure in instances where the vendor has not made the agent aware of those matters in the first place.

For example, an agent acting in the best interest of a vendor in the sale of a stigmatised property may in all the circumstances advise the vendor to conduct the sale themselves. It is submitted this is repugnant to the interests of consumer protection.

Matters that could possibly be considered to stigmatise a property range from a murder or violent crime having taken place on the property to the presence of asbestos or other latent or safety defects, through to matters relating to cultural or religious beliefs.

It is submitted that in the interest of consumer protection the following should be addressed in the new Regulation:

1. To ensure consistency for purchasers there needs to be a disclosure obligation on the vendor corresponding to the obligations on the agent under the PSBA.
2. To ensure clarity for agents and vendors, the concept of what comprises a "stigmatised property" needs to be clearly defined in the legislation.
3. To ensure certainty of disclosure, the vendor's disclosure obligations need to be contained in the contract.

### *Asbestos*

We note your comments that the section on asbestos has been removed from the Discussion Paper as the outcome of the Loose Fill Asbestos Taskforce is still pending.

It is submitted that loose-fill asbestos, although known as the most dangerous, is only one type of hazard associated with asbestos. As mentioned above, the presence of asbestos could be considered to be a stigma in relation to a property. In addition, some asbestos issues may be latent defects in a property.

It is submitted that there needs to be a mechanism to put prospective purchasers on notice of the presence of asbestos in a property. To achieve this, a mandatory asbestos report prepared by a licenced asbestos inspector setting out the location of asbestos and a management plan, should be attached to the contract for sale.

### *Strata certificate*

The Institute is of the view that, in addition to a strata inspection certificate, a certificate pursuant to section 109 of the *Strata Schemes Management Act* 1996 should be attached to the contract. This way purchasers will be put on notice upfront about the costs associated with the strata lot they are considering purchasing, including any existing special levies.

### *Planning certificate*

It is submitted that the certificate pursuant to section 149(5) of the *Environmental Planning and Assessment Act* 1979 should also be a prescribed attachment to the contract. In practice purchaser's lawyers and conveyancers obtain this certificate after exchange.

### *Building and pest reports*

The draft Discussion Paper recognises that frequently there is duplication and additional expenses incurred by prospective purchasers in obtaining building and pest reports for a property and then being unsuccessful, and that purchasers are understandably upset at having incurred the expense and missing out on the property.

It is submitted that, to ensure economy, convenience and reliability for purchasers and vendors the following matters should be legislated:

1. The building report should be one of the prescribed documents.

2. There should be a requirement for building inspectors to be licenced, with an obligation that inspectors act impartially and there should be a prescribed set of qualifications.

3. There should be a legislated mechanism whereby the purchaser can have a right of recourse against the building inspector in respect of the contents of the report, even though the vendor commissioned the report.

4. Building reports should be standardised with a prescribed list of matters to be addressed, including:

    - asbestos;
    - glass safety;

- window safety locks;
- smoke alarm compliance;
- safety and structural integrity of decks and balconies;
- the presence of lead paint;
- electrical installations;
- swimming pool compliance;
- blind cord safety;
- other hazards located on the property.

The above list comprises the matters which a property manager (with no building expertise) is required to address when managing and leasing a property. It is submitted that this falls more appropriately in the domain of the building inspector.

In addition, prescribing the areas which a building report must cover ensures that the building inspector turns their attention to the relevant issues and that the parties have a better understanding of the contents of the report.

## Comments on Discussion Paper

1. On page 4, under the heading of "Objectives of the Regulation":

   In the third paragraph, after the first sentence, please add a sentence to the effect that a vendor is not required to disclose latent defects in the building or any stigma attached to the property.

   In the fifth paragraph, where it states that there has been relatively little litigation, it would be useful to add some information and statistics to illustrate how much litigation there has been and how it compares to other areas of law.

   Under the "Issues for Discussion" heading, please add the following questions:

   - *Should there be an obligation on the vendor to disclose latent defects in the building (as well as defects in title)?*
   - *Should there be an obligation on the vendor to disclose the existence of any stigma associated with the property?*

2. On page 5, in the fourth bullet point under the "Prescribed documents" heading there is a typographical error – "sale of fall through" should read "sale to fall through".

3. On page 6, in the paragraphs listing the suggested additional documents, an additional paragraph "D. Asbestos Report" should be added.

4. On page 6, under the heading "Pest and Building Inspection Reports", in the second paragraph it should be clarified that pest reports identify other pest activity in addition to termites. Also, the discussion should mention that currently pest and building reports commonly contain extensive disclaimers which reduce their usefulness and reliability. This reinforces the need for building inspectors to be appropriately qualified and regulated.

5. On page 8, under the "Issues for Discussion" heading, please add the following questions:

   - *Should building inspectors be regulated and subject to a minimum set of qualifications?*
   - *Should various compliance matters (for example, window locks, balcony safety, blind cord compliance) be included as mandatory matters to be covered in building reports?*
   - *Should the contents of the building reports be prescribed and standardised?*
   - *Should there be prescribed warranties by the vendor as to compliance with safety and building matters (for example, window locks, balcony safety, blind cord compliance, swimming pools)?*

6. Page 9, under the "Issues for Discussion" heading, there should be some discussion about the role of the certificate under section 109 of the *Strata Schemes Management Act* 1996. Please also add the following question:

   - *Should the certificate pursuant to section 109 of the Strata Schemes Management Act 1996 be a prescribed document?*

7. Page 14, in the first paragraph under the heading "The need for specific disclosure in off-the-plan sales", the last part of the first sentence should include the word "not" so it reads "…or the strata building has not yet been built".

8. Page 14, in relation to swimming pool certificates, it should be considered whether the mechanism should be similar to the off-the-plan sales, i.e. the purchaser is not required to complete until 14 days after the swimming pool certificate has been issued.

The REINSW appreciates the opportunity to provide this submission and welcomes discussion of the issues raised with the legal and policy officers at the department of Land and Property Information.

Yours faithfully,

Tim McKibbin
Chief Executive Officer
The Real Estate Institute of NSW