

Australian Property Institute Limited

SUBMISSION

REVIEW OF THE CONVEYANCING (SALE OF LAND) REGULATION 2010 AND THE CONVEYANCING PROCESS IN NSW

Date 7 October 2016
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TABLE OF STATUTES AND DERIVATIVE DOCUMENTS CITED:

Community Land Management Act 1989 (NSW)
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Conveyancing (Sale of Land) Regulation 2010 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Mine Subsidence Compensation Act 1961 (NSW)
Mining Act 1992 (NSW)
Property Stock and Business Agents Amendment Regulation 2016 (NSW)
Sale of Land Act 1962 (VIC)
Strata Schemes Management Act 1996 (NSW)

CASES CITED:

Lysaght v. Edwards (1876) 2 Ch D 499

1. Preface

- 1.1** The Australian Property Institute (the Institute) is the leading and contemporary membership organisation for property professionals which develops and supports our members to advise the community and business. The Institute is impartial, objective and independent.
- 1.2** The Institute members can be found across all sectors of the property profession, in private practice and in the public sector. This broad base of qualified and skilled professionals is unique to the Institute. The Institute is committed to building and maintaining a strong base for the future of the property profession through broadening the expertise and knowledge of membership.
- 1.3** This submission to The Office of the Registrar General by the Institute on the *Discussion Paper: Review of the Conveyancing (Sale of Land) Regulation 2010 and the Conveyancing Process in New South Wales*¹ is part of ongoing research efforts and dissemination of factual and dispassionate information about property rights in Australia.
- 1.4** In addition, the Institute records its appreciation for the invaluable and numerous discussions that occurred during the preparation of the submission with members of the Submission Committee. This submission however does not necessarily represent the views of any of the individual members of the Submission Committee, sitting strictly extra-curially.

2. Introduction

- 2.1** This submission responds to the invitation by the Office of the Registrar General Department to garner feedback on the *Discussion Paper* by Friday 30 September 2016 – an extension was kindly granted to the Institute to lodge this submission by Friday 7 October 2016. The Institute welcomes the opportunity to respond to the invitation for feedback by the Office of the Registrar General, in particular on the overall issue of “new developments to the conveyancing process”² notably the increasing number of auction sales, and an increase in the number of off-the-plan sales.
- 2.2** Currently, the passing of risk from the vendor to the purchaser as once established in *Lysaght v. Edwards (1876) 2 Ch D 499* has been greatly ameliorated since that time, such that the risk described by the phrase ‘caveat emptor’ (let the buyer beware)³ is now replaced largely by the requirement upon the vendor at s.52A(2)(A) *Conveyancing Act 1919*. Currently *Schedule 1* of the *Conveyancing (Sale of Land) Regulation 2010 (Regulation)* provides for sixteen classes of ‘prescribed document’ which must be attached by the vendor to the contract for the sale of land.
- 2.3** It is noted by the Institute that the sixteen classes of documents canvass five crucial areas of concern to many prospective purchasers, namely title, zoning, sewerage location, land boundaries, and swimming pool compliance. The key task of the review of the current *Regulation* is to determine whether the disclosure objectives of the current regulatory regime are being achieved, namely:
- a.** speed up conveyancing transactions,

¹ Office of the Registrar General (2016), *Discussion Paper: Review of the Conveyancing (Sale of Land) Regulation 2010 and the Conveyancing Process in New South Wales* (Sydney) August.

² Office of the Registrar General, 5.

³ Office of the Registrar General, 7.

- b.** *reduce the period between verbal agreement and entry into a legally binding contract,*
- c.** *provide protection for purchasers who enter into a contract relying on the prescribed documents and the vendor's warranties, and*
- d.** *maintain the conveyancing objective of balancing what a vendor must disclose with what a purchaser can reasonably confirm through their own enquiries⁴.*

2.4 A key question in preparing this response to the review of the *Regulation* by the Institute's Submission Committee has been to ascertain whether purchasers are fully entitled to the well-established remedy of specific performance⁵ once the 'promises' embedded in the contract of sale by the vendor have not been fulfilled such that a breach of contract is evident. That key question from the standpoint of the Institute mirrors the discussion in the *Discussion Paper* wherein various proposals for reform are described⁶.

2.5 The following section of this submission responds to the various issues posed in the *Discussion Paper* referred to earlier. However the Institute looks forward to providing any further advice and consultation on this submission to the Office of the Registrar General if requested. For any further information or clarification, or to arrange a meeting please contact Stephen Child, Member Services Manager – NSW, Australian Property Institute at schild@api.org.au or on (02) 9299 1811.

3. Comments and Recommendations

3.1 Objectives of the Regulation

Issues for Discussion

Q. 1 Is the Regulation achieving its objectives?

Q. 2 If not, why not: what practice issues have you encountered that demonstrate that the Regulation is not meeting its objectives?

Response:

The *Regulation* substantially achieves its objectives; however, given the changes in conveyancing expectations due to increasing auction sales, off-the-plan sales and the progressive introduction of electronic transactions, the mandatory disclosure of salient information regarding a specific property arguably requires upgrading.

⁴ Office of the Registrar General, 6.

⁵ Gray, J, and Edgeworth, B (2003) *Property Law in New South Wales* (Sydney: Lexis Nexis Butterworths), 208.

⁶ Office of the Registrar General, 8-15.

3.2 Vendor Disclosure

3.2.1 Prescribed Documents

Issues for Discussion

- Q. 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)?**
- Q. 4 Should vendors be required to supply pre-purchase reports to contracts for the sale of land for all property sales at auctions?**
- Q. 5 Should a purchaser be able to sue the author of the report if it is incorrect or negligent?**
- Q. 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?**

Response:

In Victoria, a prospective vendor is required at *s.32 Sale of Land Act 1962* (Vic) to provide a statement which includes information which is “factually accurate and complete”⁷ covering mortgages, covenants, easements, zoning, outgoing (e.g. rates), and a declaration if located in an area prone to bushfire. There are additional requirements where the property is strata. The *s.32* statement, if found to be incorrect or insufficient, permits a purchaser to withdraw from the contract or to take action for performance or damages.

In contrast, the *Property Stock and Business Agents Amendment Regulation 2016* (NSW) now requires from 15 August 2016 real estate agents to record salient reports about a property which include pre-purchase building and pest inspection reports and where applicable, strata and community scheme reports (see 3.2.2 below).

On balance, the Institute considers that the five key areas covered by the ‘prescribed documents’ currently listed in *Schedule 1* could be expanded in a manner similar to that prescribed in the Australian Capital Territory (ACT) wherein an intending vendor is required to attach the ACT Sellers Package to any contract of sale. The ACT Sellers Package includes four separate reports, namely a Building Report, Pest Report, Compliance Report and an Energy Efficiency Report⁸. The four reports comprising the Package currently are a charge incurred by the prospective vendor paid either 180 days from the invoice date from ACT Property Inspections or the date of settlement whichever the earlier. The Package is sent electronically to the prospective vendor, real estate agent and solicitor, at a current cost of \$1 090.

⁷ Consumer Affairs Victoria (2016) *Conveyancing and Contracts for Sellers*. Roneo (available at: <http://www.consumer.vic.gov.au/housing-and-accommodation/buying-and-selling-property.pdf>) (viewed 4 October 2016), 2.

⁸ ACT Property Inspections (available at: <http://www.actpropertyinspections.com.au>) (viewed 5 October 2016).

3.2.2 Strata Record Inspection Report

Issues for Discussion

- Q. 7 Should a strata record inspection report be a prescribed document (giving a purchaser a rights of rescission if the document is not attached to the contract for sale)?**
- Q. 8 Do purchasers find the strata report inspection report reliable? Are there circumstances where the report is not considered useful?**

Response:

As mentioned above, the *Property Stock and Business Agents Amendment Regulation 2016 (NSW)* requires agents to record specific documents relating to the strata property as set out in *s.108 Strata Schemes Management Act 1996 (NSW)*, a financial matters certificate as set out in *s.109 Strata Schemes Management Act 1996 (NSW)* and (where applicable) such documents pertaining to the property as set out in *s.26 Community Land Management Act 1989 (NSW)*.

The Institute considers that this required information should also be included as prescribed documents in *Schedule 1*.

3.2.3 Sewerage Location Diagram

Issues for Discussion

- Q. 9 Should it be mandatory for a sewerage reference diagram (if available) to be a prescribed document?**
- Q. 10 What has been your experience when dealing with locating the authority's sewer?**
- Q. 11 Are the new diagrams useful in any way? Should they not be a prescribed document if they cannot be relied on?**

Response:

Sewerage reference diagrams (if available) should be a prescribed document in *Schedule 1*.

3.2.4 Proposed Demolition Orders by Council

Issues for Discussion

- Q. 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?**
- Q. 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?**

Response:

The Institute considers that the vendor should warrant that a proposed order has or has not been received from council.

3.2.5 Order for Adequate Fire Safety*Issues for Discussion*

Q. 14 Should the vendor warrant that the property is not subject to an order for fire safety awareness?

Q. 15 Should a fire safety order be a matter for disclosure in a section 149(2) certificate?

Response:

The Institute considers that a fire safety order should be a prescribed document in *Schedule 1* being contained within a certificate issued pursuant to *s.149 (2) Environmental Planning and Assessment Act 1979 (NSW)*.

3.2.6 Mine Subsidence Issues*Issues for Discussion*

Q. 16 Should the Regulation deal with mine subsidence issues, or does the present scheme operate satisfactorily?

Q. 17 If the Regulation is to deal with mine subsidence, should this be as a prescribed warranty, prescribed document or otherwise?

Response:

The Institute considers that the suggestion for a Mine Subsidence Certificate to be included as a prescribed document at *Schedule 1* for properties located within Mine Subsidence Districts should be adopted. Further, in the Institute's submission of 18 March 2016 to the NSW Department of Finance, Services & Innovation *Review of Mine Subsidence Compensation Act 1961 (NSW)*, it was stated that:

API considers the list of compensable items in s.12 (1) (b) should be expanded to include the definition of "significant improvement" as provided in the Mining Act 1992, viz:

Significant Improvement means any substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure.⁹

As expansion of mining occurs into areas of NSW which are not currently within the existing 19 gazetted Mine Subsidence Districts, the creation of new Mine Subsidence

⁹ *Mining Act 1992, Dictionary "Significant Improvement"*.

Districts will almost certainly impinge upon areas which are essentially non-urban. Established mining areas such as the Hunter and Illawarra urban regions are distinguished from those newer areas currently being opened for mining, such as the Liverpool Plains containing predominantly laser contoured irrigation lands.

Notwithstanding the predominantly non-urban status of these newer areas currently being opened for mining, it is recognised that AS 2870 1996 Residential slabs and footings-Construction will apply to any construction of building and similar works within these areas if part of a new gazetted Mine Subsidence District. Further, the relevant local consent authorities in these newly opened mining areas must, when assessing development applications for non-mining development in Mine Subsidence Districts, refer the application to the Mine Subsidence Board pursuant to the Environmental Planning and Assessment Act 1979¹⁰. It is the view of the API that this process in newly opened mining areas should be widely disseminated to ensure broad public understanding of these enlarged development assessment processes.

API notes that the presence of broad scale laser contour irrigation in these newly opened mining areas will introduce a facet of compensable damage arising from subsidence which could be widespread, and previously uncommon as a compensation claim.

It is noted that mining access agreements are not readily available, and API considers that such agreements should be contained within a publicly available Register of all such agreements. Such a Register would assist consent authorities when considering development applications within a Mine Subsidence District, intending purchasers of land holdings, existing and prospective providers of debt or equity to be secured over land holdings, and valuers undertaking valuations of such land holdings.¹¹

Further the Institute's submission of 18 March 2016 stated that:

API holds the view that vacant land includes those lands which may be used for agricultural purposes and subject to laser contour irrigation and if adversely affected by subsidence or the likelihood of subsidence, ought to be acquired by the Board. The reason for this response lies in the fact that laser contour irrigation may be significantly affected by even minor subsidence, or the likelihood of minor subsidence continuing over a significant term of years requiring re-contouring many times, rendering a significant recurrent cost to the land holder. Failure to acquire such land that has been adversely affect by such subsidence or the likelihood of subsidence is manifestly unjust.¹²

¹⁰ s.91 Environmental Planning and Assessment Act, 1979.

¹¹ Australian Property Institute (2016) Submission to the NSW Department of Finance, Services & Innovation on Review of Mine Subsidence Compensation Act 1961 (Sydney: 18 March), 5.

¹² Australian Property Institute, 7.

3.2.7 Loose-Fill Asbestos Insulation

Issues for Discussion

- Q. 18** *Should the Regulation deal with the possible existence of loose-fill asbestos insulation?*
- Q. 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?*

Response:

The Institute considers that the prospect of loose-fill asbestos insulation should be the subject of a vendor warranty but not necessarily a prescribed document at *Schedule 1*.

3.2.8 Expanding Complexity of the Contract

Issues for Discussion

- Q. 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?*
- Q. 21** *Should any documents be removed from the list of prescribed documents? Should this relate to all sales or just for residential or commercial properties?*
- Q. 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)?*
- Q. 23** *Should the Regulation provide an alternative, electronic means of providing the prescribed documents? How might this be best achieved?*
- Q. 24** *Have you exchanged contracts electronically with the use of digital signatures? Is this a beneficial practice? Were there any challenges in this process?*

Response:

The Institute considers that s.149 Certificates under the *Environmental Planning and Assessment Act 1979* (NSW) should be expanded to include development standards as currently the Certificates do not establish all of the terms of the relevant environmental planning instruments that apply to the property. This shortcoming has also been identified previously in the respected *The Environmental Law Handbook*¹³.

The Institute offers no other comments.

¹³ Thorpe, A. (2016) "Land Use Planning" in Williams, P (ed.) *The Environmental Law Handbook: Planning and Land Use in NSW* (Sydney: Redfern Legal Centre Publishing - Thomson Reuters), 128 [3.720].

3.3 Issues Arising in Off-the-plan Contracts

3.3.1 Contractual Disclosure

Issues for Discussion

- Q. 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?*
- Q. 26** *Should the by-laws be disclosed in the contract for sale of off-the-plan strata units?*
- Q. 27** *Should an estimate of future levies be included in the off-the-plan contract?*
- Q. 28** *Should a disclosure statement similar to those in Queensland be required to be attached to off-the-plan contracts?*

Response:

The Institute offers no comments apart from the suggestion that the ACT Sellers Package should be adopted once the building works have been completed.

3.3.2 Cooling Off Period

Issues for Discussion

- Q. 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?*
- Q. 30** *Should there be any change to the amount a purchaser forfeits when exercising cooling off rights under an off-the-plan contract?*

Response:

The Institute offers no comment, except that the five day period should be extended to ten days to permit the prospective purchaser adequate time to seek professional advice such as architectural.

3.3.3 Sunset Clauses

Issues for Discussion

- Q. 31** *Have you experienced situations where a developer sought to terminate the contract under a sunset clause? Has the addition of s66ZL of the Conveyancing Act 1919 made an impact on this practice?*
- Q. 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?*
- Q. 33** *Is s66ZL achieving its objective? If not, why not?*

Response:

The Institute offers no comment.

3.3.4 Other Off-the-Plan Issues

Issues for Discussion

Q. 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?*

Q. 35 *Have you experienced any other issues in off-the-plan conveyancing which could have been resolved through legislative intervention?*

Response:

The Institute offers no comment.

3.4 Swimming Pool Certification Regime

Issues for Discussion

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

Q. 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?*

Response:

The Institute offers no comment.

3.5 Other Improvements Identified by the Committee

3.5.1 By-laws

Issues for Discussion

Q. 38 *Do you oppose any of the changes identified by the Committee above, and if so, why?*

Q. 39 *Are there any other improvements to the Regulation which you would like the Committee to know about?*

Response:

Please see earlier comments.

3.6 Final Questions

Issues for Discussion

- Q. 40 Should any of the existing compulsory annexures to the contract for the sale of land be removed or modified?***
- Q. 41 Should there be any changes to the existing prescribed warranties?***
- Q. 42 Should there be any changes to the existing implied terms and prescribed terms?***
- Q. 43 Should there be any changes to the existing purchasers' remedies?***
- Q. 44 Are there any other documents that should form part of the review that are not discussed in this paper?***
- Q. 45 Any other considerations that should be taken into account?***

Response:

Please see earlier comments.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of approximately 8,000 property experts throughout Australia.

The Institute, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO) and the World Bank, evidencing a level of expertise within the Institute and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members. Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.

APPENDIX 2

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