

# **SUBMISSION OF KEITH ROSS HEWLETT, SOLICITOR, TO REVIEW OF VENDOR DISCLOSURE OF RESIDENTIAL PROPERTY SALES IN NSW**

## **INTRODUCTION**

I am a solicitor independent of real estate agents, finance providers and pest and building inspectors who has worked in the conveyancing legal area in NSW continuously for 25 years.

I am very concerned about any proposal to stipulate that vendors must provide building inspection or pest inspection reports prior to auction or sale by private treaty of real property in NSW.

My concerns are mainly for purchasers, and this submission will concentrate on those concerns.

I firstly wish however to thank the government and LPMA for considering this matter. I think that the consideration of the proposals has been very useful to bring out into public debate some longstanding underlying problems in these areas, and at the end of the submissions, I put forward some possible reform ideas which I hope are of interest.

## **BACKGROUND**

I have often and regularly obtained pre purchase pest or building inspection reports for prospect purchasers since about 1988.

During that period, time and time again, I have found that a *good* pre purchase building or pest inspection report (of which I have received many), to be extremely valuable, even if just a visual report.

A *good* pre purchase building or pest inspection (even if just visual) can, and usually does, identify the cause or nature of serious building or pest problems affecting a property. If not, it at least identifies where there is a substantial likelihood or risk of such problems warranting further investigation. This is because, in my experience, a good inspector can usually diagnose, even from a careful visual inspection, critical (if any) underlying substantial problems with a home.

I would however endorse reported comments made by the Honourable Cherie Burton M.P. to NSW Parliament on 1 September 2009 stating in part that "...A home inspection will be of great value, *if the right person is employed to do it...*" (my emphasis added) and that "Feedback tells us there is already a *huge variation* in the quality of inspectors in New South Wales—even though they are all licensed.." (NB my emphasis added, and noting that licensing is no longer required).

I firmly believe that that huge variation still exists.

Over the years, I have often heard complaints about the standards of some pest and building inspectors. At one point about 12 years ago, I became concerned about changed practices at one pest and building inspection company I was then using.

After a change of ownership I believe, the inspection work of that firm became, apparently, sub contracted out to quite a few different inspectors, and I formed the opinion that inspection standards had become variable. An apparent fine print exclusion of at least one major defect type also concerned me, as did me forming a view that the inspection firm were possibly receiving referrals from estate agents who had an interest in transactions proceeding. Recent comments to me indicate that such issues can still be of concern in that industry.

In the last 12 years however, I have regularly used a different pest and building inspection consultant service for my purchaser clients. I have been delighted with their work. During that period, I have on occasions (*after careful selection*), used a few other such consultants and, for the most part, been pleased with their work.

I sometimes hear how much people in the community already know well about conveyancing. Yet I am surprised about the lack of knowledge, even amongst university educated people in professional positions. Purchaser clients often make to me incorrect comments based, apparently perhaps on what they hear at social functions or down the street, seemingly from people who are interested in seeing transactions proceed quickly and cheaply (*and remembering that – certainly in my experience – people will often talk to their legal representative later than other relevant providers such as real estate agents*). What is being advocated to those purchasers can even be contrary, for example, to what appears on government websites that those purchasers could easily access. Perhaps those purchasers should know better, but they don't, possibly because incorrect information is provided to them beforehand by *more than one* source.

For example, I have this year been informed by quite a few purchaser clients to the effect that I shouldn't need to carry out any government departmental enquiries. This is incorrect, and also not consistent with what is indicated in several formal public factsheets available on the internet (for example, NSW Office of Fair Trading "Conveyancing" Fact Sheet, Housing NSW pamphlet "A Guide to the Cost of Home Purchase" and Housing NSW "Guide to Purchasing Your Home").

When I ask those purchaser clients if they have read such publications, the answer is invariably "No" (*and here noting in passing that this is probably why a good information sheet about carefully choosing building and pest inspection consultants at the OFT website on its own is no better, and probably worse, protection for purchasers in relation to choosing such reports than licensing those consultants*).

The pest and building inspection consultant I regularly use estimates that up to 60% (!) of Sydney residential purchasers he deals with do not really know what they are truly buying and substantially depend on his advice to better inform them (Disconcertingly, I can say that the inspector's estimate does not fully allow for other matters – such as legal defects, strata concerns, some misrepresentations or gazumping matters - which cruel many other purchase transactions for those other reasons or later cause loss to purchasers, but this submission focuses on pest and builder's inspection consultant report matters).

It is so important, in my view, for a purchaser to be able to commission their own good pest or building inspection report. The pest and building inspection consultant service that I use provides a very good, high quality and invaluable service to my clients.

A crucial part of that service, and to its success, is that the service ensures that the purchaser, or usually at worst a trusted relative or friend, is present at the site when the inspection is being finalised, to explain the concerns found.

The one inspector of that service, in my experience, reports comprehensively, frankly, honestly and without fear to the purchaser, knowing that the purchaser is the one who the inspector is accountable for and who shall promptly pay the inspector's fee. That service, as well as other competent pest and building inspection services, often save or make for purchasers a difference of tens of thousands of dollars (and sometimes more).

### **MY MAIN CONCERNS ABOUT MANDATORY VENDOR BUILDING OR PEST INSPECTION REPORTS**

There are clearly, as noted above, poor pest or builders inspectors, and the protections in place to try and ensure quality are insufficient in my opinion. It will be difficult to stop a vendor instructing one of those inspectors.

It might be thought that this can be overcome by preventing a vendor "shopping around" by making them disclose all reports obtained.

This is incorrect, I can say firmly to you. Based on long experience in consideration of engagement of experts in other legal areas, I think that it will quickly become known amongst estate agents and legal representatives which inspectors are more likely to provide favourable reports. Many vendors who are looking for a favourable report will likely go straight to such an inspector and not need to obtain more than one report.

Further, whichever inspector is instructed by the vendor will be paid at first instance by the vendor, and so that inspector will, at the very least, not be inclined to provide an overly negative report. Even worse, some may disguise a negative report in the way the written report is presented. This is a grave concern.

It might be thought that requiring an inspector to carry professional indemnity insurance by itself will filter out poor or misleading inspectors. I would firmly disagree. Based on my previous experience in this field, and especially in dealing with other experts or other service providers who hold professional indemnity insurance, I have seen plenty of what I would consider poor work to have been carried out by such insured parties and it is often not easy to hold them to account (please see below).

Also, importantly, the potential purchaser will be denied the valuable right to be present when the inspection is being carried out or completed, so that the inspector can point out, explain problems, suggest solutions and answer any questions. Having regard to the highly disclaimed written reports nowadays and the difficulty of describing some construction or defect problems briefly in writing, this is most important. In the last few years, this is how my firm, and how the pest and building inspector I usually instruct, work. It is so successful for the purchaser to be present at the inspection to have concerns explained, that I (and I believe the inspection consultant) would not go back to a previous system of not doing this. Both that inspector and I have found it superior to all other systems.

Of further concern, if the vendor were to provide a report, is that a heavily disclaimed and difficult to interpret report is likely to issue. I have seen even experienced solicitors and conveyancers not being able to properly comprehend normal reports, let alone one that maybe written up to be less transparent.

Even after having seen, read or explained possibly over one thousand of such reports in my career and being used to the expressions and formatting of the consultant I usually use, I still often also rely on the *verbal additional comments* of that usual consultant as the written report - in a lengthy fairly rigid and lengthy format apparently suggested by the indemnity insurer having regard to issues such as new court decisions and changes to the Australian Standard - may not be able to properly express or convey the inspector's concerns or overall impressions.

It might be argued that the written report difficulties could be overcome by the vendor's inspector being available to answer questions of the purchaser's solicitor.

Based on many years of experience however, I think this is very unlikely to help. Suffice it to say that I have often found it to be most unsatisfactory, and sometimes most unfortunate, in cases of trying to obtain information from a third party or about a report commissioned by a third party. These unsatisfactory, or unfortunate, experiences include trying to obtain information missing from a written strata records reports from some strata managing agents, recently trying to obtain a copy of an occupation certificate from an accredited certifier who issued it as Council did not hold it, trying to obtain some basic information about contamination of land from a private contaminated land auditor and, in general, trying to obtain information from any expert engaged by another party.

Even if the inspector is willing to speak to purchaser or their representative, I am concerned that a purchaser or their solicitor will not receive fearless, independent and fully honest comments from even a good inspector who will likely know that adverse comment will possibly lead to failed or delayed sale, the vendor not achieving quick reimbursement of report costs from a purchaser or a displeased agent or vendor unwilling to recommend that inspection service to others.

Even if the inspector is ready willing and able to speak to the purchaser's solicitor, there is just very little prospect in my experience for a purchaser's representative such as myself to properly check, with an inspector that the representative is unfamiliar with, the competence of a pest or building inspection in a (often quick) telephone conversation, and especially without having seen the property. Even if the purchaser (who has seen the property) instead speaks to the inspector, the purchaser can easily be overwhelmed or confused by jargon used.

Further, it is only of cold comfort that purchasers will be given the right to sue in the event of a report, for example, being materially false or misleading in some way.

As a solicitor who also acts in civil litigation matters, I would say that claiming compensation from an inspector alleged to have not exercised reasonable care and skill or to have prepared a report which is false or misleading in a material particular would in my view often be difficult. Wide and numerous disclaimers, the relevant Australian Standard or counter expert reports would, I think, make many things defensible (or arguably so) and often discourage the taking or pursuing of an action. Litigation of this type will likely be expensive time consuming and risky. Cases involving building aspects often need other willing and qualified experts and clear explanation of many technicalities (with the other side likely to cast doubt or provide opposing technical evidence) requiring considerable time and cost.

Unless the final outcome is very clear (which in this type of case it would often not likely be, I would firmly believe), especially with litigation being expensive, the advice to the client may well be "if you're not very confident that you will be successful, the risks and costs and time delay are too great, don't do it".

Finally, on this point, as a good Barrister made clear to me years ago against his own interest, that prevention is much better than cure - a person is much better off to avoid purchasing a defective property rather than being left with a legal right to possibly sue an inspector.

I submit that my main concerns expressed above weigh very heavily against any proposal to stipulate that vendors must provide building inspection or pest inspection reports prior to auction or sale by private treaty of real property in NSW

### **OTHER CONCERNS ABOUT SUCH MANDATORY VENDOR REPORTS**

Since first considering this matter in March this year, I have since perused the ACT legislation and sought the views of some stakeholders including obtaining further comments from the usual pest and building inspection consultant I instruct, perusing the formal submissions of the Law Society of NSW and discussing the issue briefly with a representative of insurance broker Rapid Solutions (which I understand arranges insurance for most of the insured pest or building inspection consultants in NSW). I thank them for their comments, and I wish to highlight some points they have made.

The pest and building inspection consultant firmly believes that there are variable standards in pest or building inspection consultants. He favours independent reports ordered specifically by the purchaser as “An inspector with a high standard will hardly ever be able to act for the vendor...as a vendor will certainly favour an inspector who is not that good...otherwise this will jeopardize the sale..”, “it is best for the purchaser to appoint the purchaser’s own inspector through the purchaser’s own independent solicitor who will know which inspector has the credibility through the solicitor’s many years of experience in dealing with that particular inspector” and “I favour independent reports ordered specifically by the purchaser because the purchaser will know the inspector is acting for the purchaser’s interest...”.

In relation to comparing Sydney to ACT, the inspection consultant says “Sydney or NSW is very different to ACT, where the buildings are relatively new and would usually comply with the Building Code of Australia. Inner city buildings in Sydney, by way of contrast, date back 80 years or more, are quite complex in construction and many don’t comply with the Building Code of Australia..”

About Asbestos (which this submission does not concentrate on), the inspection consultant says “Good pest or building inspection consultants I think should be able to quickly ascertain and already comment (at least verbally) on likely presence of such material. Asbestos audit report is costly to obtain and can cost up to \$1000 to obtain. Any cement sheet suspended containing asbestos fibres may have to be lab tested to confirm. Most of the ACT buildings are relatively new and are less likely to contain asbestos fibres. In Sydney, it is different.”

Interesting, when asked about the skills of a good pre purchase building or pest inspection consultant, he says “Experienced builders are not always good building or pest inspectors. Pre purchase building or pest inspectors have different skills. Normal builders concentrate on building things, not on analysing problems in existing structures. To be a good pre purchase building or pest inspection consultant, you need building skills, but also to be interested and keep learning about how and why problems come up. You need to be able to analyse the likely cause of problems just from visual inspection, have years and years of onsite job experience,

understanding how defects show up or can be concealed and to understand risks.” At this stage, the consultant believes it would be better for inspectors to be licensed than not.

The Law Society of NSW submission to you comments that existing vendor disclosure annexures to the contract “...are issued by monopoly providers...are authoritative rather than qualitative or subjective..” (*NB – my note - pest or builder’s inspection reports are qualitative or subjective*).

Later, the Law Society importantly in my view states “The Committee notes that, even if such a system were to be introduced, purchasers will in all probability be advised to continue to commission their own pest and building reports.” I would certainly advise purchasers to continue to commission their own pest and building reports.

The Law Society also notes “..a number of significant differences between the ACT and NSW titling and conveyancing systems...” - including that ...”title in the ACT is historically leasehold rather than freehold..”, “..documentary history of a property is more likely to be available in the ACT..”, “The number of government authorities which regulate building works in the ACT is far fewer than in NSW..”. I strongly agree with all these comments, and with the indication that therefore ACT cannot be considered a truly “comparable jurisdiction” in respect of this topic.

The Law Society’s full comment about documentary history of a property is particularly important. For example, just recently I was unable to promptly obtain from the relevant Sydney suburban Council (*not* being Liverpool or Bankstown Council where there have been fire events I believe), or from the accredited certifier or the vendor, either a copy of a Final Occupation Certificate or Home Warranty Insurance schedule evidence of cover for a villa/townhouse whose construction was apparently completed in just 2005.

In the case of Rapid Solutions insurance brokers, I asked for – and received - a copy of their submission to you, and I strongly endorse comments of theirs (in discussing the proposal for vendor to provide pest or builders reports) which state “The following should be borne in mind:

- a) The Consumer has no knowledge of the business or inspector who provided the report as they were not involved in the selection process;
- b) The Consumer has no knowledge of any ongoing relationship between the inspector and the Real Estate Agent who will generally provide the instructions under the proposed system;...”

Even if the latter of the concerns above is overcome, the former concern is by itself a strong criticism of the ACT model in my view.

### **CONCERNS ABOUT COST OF PRE-PURCHASE PEST OR BUILDING INSPECTION REPORTS UNDER THE CURRENT SYSTEM**

As noted in the previous two sections of my submission, there are overwhelming arguments against a NSW residential property vendor supplying a building or pest inspection consultant’s report along the lines of the ACT model in my view.

I would like to briefly address the issue of cost of pest and building inspection reports, which can in my experience be a total of about \$500 or sometimes more.

In most situations, in my experience, purchasers who spend that money but who do not buy the property do not, and especially in the long term, begrudge the expenditure.

In fact, in the long term, if the report has helped find some substantial problems with a property and leads to a purchaser not proceeding with the purchase, the purchaser is often grateful.

A recent example is a successful professional person taking 4 serious property purchase attempts (and from recollection at least 3 lots of pest and builder's reports) to secure a property. About 1 year later, I spoke to the purchaser who expressed great relief about missing out on the first 3 properties, due to various reasons, and joy that the purchaser had bought the 4<sup>th</sup> property, considered in hindsight to be much superior to the 3 previous. I recall other similar examples to this purchaser.

Usually, in general, I find that purchasers are careful in spending money on pest and builder's reports, are quick learners and do not begrudge a mistake. For example, where they have been led to believe that a property at auction will sell at a certain "low" price range and obtain a pest and builder's report in anticipation of that, but the property sells at a much higher price. If a prospect purchaser in such as case makes that error, in my experience, they will learn quickly, more carefully research likely price before the next auction and not make that same error again.

What about the situation where there are 5 or 6 reports obtained before an auction? While this may occur in certain property markets in certain conditions, it does not warrant overall reform, especially having regard to all the disadvantages described above. In any case, existing practices (please see below) allow some flexibility in this type of situation.

In that situation however, I am informed that, for example, Rapid Solutions may allow real estate agents (as far as Rapid Solutions is concerned) to release a copy of such reports obtained (authored by an consultant insured by them) in the week before the auction. Rapid Solutions report however that not all agents release them, and of course the prospect purchaser who commissioned the report in question or the consultant who authored the report may not be so obliging.

Also, I know of at least one inspection company (and I understand that there maybe others), in a different but related field, which allow previous reports to be listed on the internet and the content to be purchased by third parties at a discounted price. Of course, it must not be forgotten that there are similar, but not quite as serious, issues around relying upon another purchaser's report as there are about relying on a vendor's report.

## **IDEAS FOR REFORM**

The good information about carefully choosing pest or building inspectors on the NSW Office of Fair Trading website is clearly not, but itself, sufficient to protect consumers and there is still a wide variance in standards of such reports in my view.

Most importantly, nor, in my firm view, do purchasers (or vendors) have sufficient good knowledge about pest or builder's reports (or other aspects about buying and selling properties) *from independent sources* early in the process.

A lot of problems can be resolved by addressing these matters. Here are some ideas I hope are of value:-

1. Such building or pest inspection consultants should again be required to be licensed in my view, and there should be random audits, or other checking methods, by people who are experienced and knowledgeable in the area to back this up.

Where could such auditors be found? Surely, there would be some of the private enterprise consultants who are nearing retirement who are sick and tired of seeing poor work carried out by some other inspectors and who would be willing to be involved to carry out audits or to help teach or train others to do so.

2. My understandings about the relevant Australian Standards about such pest and builder's reports is that, although the Standards are available on the internet, full access may need to be paid for. Even careful experienced practitioners such as myself will balk at paying the fee. Given the public interest, perhaps a request should be made for the particular standard to be freely publicly available in this case. If freely publicly available, a copy of the standard should then be provided at the OFT, Law Society and Institute of Conveyancers websites in my view.
3. Perhaps there should be a review of the relevant Australian Standard relating to such reports, given concerns about the limitations of the written reports and the ability to comprehend them. Such a review however should in my view always have in mind that a good pest or building inspector can provide very valuable and useful information to a purchaser, even though it is just a visual inspection.
4. Perhaps in line with the previous recommendation, the Standards Authority can suggest or assist in providing some benchmarking levels for good pre purchase pest or building inspectors to strive to attain (and retain) a higher status level that those inspectors could then achieve and then promote to their clients. This might be a way of for better inspectors to be better able to differentiate themselves, and for prospect purchasers to find some better inspectors.
5. There should definitely be more education of solicitors and conveyancers as to how to read and interpret builders and pest reports, having regard to the relevant Australian Standards. In other legal areas this occurs. For example, a good personal injury lawyer is well advised, and often does, learn to understand doctor's reports, applicable medical terminology and typical types of injury and disabilities arising from compensable accidents and incidents.
6. I understand that there is an MBA course for pre purchase building or pest inspection consultants. I believe that the quality of this course should be checked, that experienced good quality pest or building inspectors in the field be encouraged to give part time input to the course, lecture or provide students with some essential on the job training. If all this is achieved, then probably the course should then be made mandatory for all budding pre purchase building or pest inspection consultants.
7. While it should not be mandatory, and the dangers of relying on a third party's report (especially if it is older) should firmly be kept in mind, perhaps in the case of popular auctions, there could be an expansion of some current practices of voluntary disclosure of

- recent inspections. These practices could be made more commonly known to prospect purchasers and property representatives. If such reports are disclosed, proper disclosure should also be made of interest in those reports (for example, if the report is by an inspector recommended by the selling agent).
8. I believe there could be a roadshow relating to purchasing (and selling) residential property generally, at the right time (please see below), just like the then Federal government had a roadshow in certain areas (such as here in Cabramatta) about mortgage default in late 2008, perhaps with people like consumer real estate advocate Neil Jenman and an experienced reputable pest or building inspection consultant being amongst the speakers.
  9. Further, I believe there should be an officially sanctioned course, possibly of say 1 to 3 month's part time duration, that people can attend to learn before buying or selling real estate. By way of comparison, for example, there is an owner builder's course and an ASX course for people wishing to invest in shares. Why shouldn't there be a, once a week (possibly at night), courses to inform and educate potential purchasers and vendors?
  10. The roadshows and purchaser education course should, in my view, emphasize the need for prospect purchasers to choose building or pest inspection consultants that are independent of the real estate agent and the vendor and for purchasers to similarly select an independent legal representative (who is, like myself, more likely to guide the purchaser to a good pest or building inspection consultant I believe).
  11. If I am correct about the large number of people who have lost a lot of money through buying and selling real estate, there should also perhaps be some statistics or multiple anecdotes found and published showing this, and this brought to the attention of mainstream media at an early stage to generate interest in the roadshow and proposed courses.
  12. There is a high percentage of residential property sales that do not proceed, often due to poor reports. When this happens, the vendor's property often gets "stale" on the market and it becomes very difficult to sell quickly. The vendor may end up taking a much reduced price. In such a case, the vendor may well have been better advised to have, at the time of listing for sale, carefully considered or disclosed any potential substantial pest or building matter concern. I don't think many vendors realize this, and how much it potentially can cost them. The roadshows and proposed courses should deal with this point, if thought appropriate.
  13. There is still a considerable number of purchasers who do not obtain pre purchase pest or builder's inspection reports I believe, such as when they purchase a property from a friend. Many later regret it. I believe that there should be even more education of purchasers to obtain such reports, except in exceptional situations such as where a likely short term demolition of existing improvements is planned. If vendors realize that it is almost inevitable that a prospect purchaser shall obtain a pre purchase building inspection report from a competent independent fearless and honest inspector, I think vendors will more carefully think about voluntary consideration and disclosure of concerns.
  14. If, against this submission, mandatory vendor provision of builder's reports is introduced, then they should apply to new homes as well in my view. New homes often have multiple

defects in my experience, and as a higher price is often being paid as the home is new, it is often even more important that a builder's report is obtained.

15. If, against this submission, mandatory vendor provision of builder's reports is introduced, regard should be had to the comments of the pest and building inspection consultant I have quoted about the costs of testing material for asbestos.

Thank you for considering this submission.

Keith Ross Hewlett,  
Solicitor  
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