

# MATERIAL FACT GUIDELINES

## Member Update

Monday, 2 March 2020

### OVERVIEW

Following our notification to Members on Friday 29<sup>th</sup> February, Consumer Affairs Victoria released the new Material Fact Guidelines on Sunday the 1<sup>st</sup> of March 2020. Estate agents must now consider these in all sales transactions, commercial or residential.

It is currently impossible to know or anticipate the extent to which a Court is likely to give regard to the Guidelines. This will develop over time once the issue has been tested before a Court. This lack of clarity by government means that it is essential that **all real estate professionals** familiarise themselves with the new Guidelines.

The REIV will soon be releasing a Checklist that Members may use for assistance with adhering to the Material Fact Guidelines.

This document provides an insight into the Guidelines, the updates made based on feedback from the REIV and clarifications provided by CAV in response to REIV queries.

### Who needs to be aware and understand the implications?

This tough new stance from the government should be understood by all real estate professionals, selling agents, property managers, auctioneers and agencies – both residential and commercial.

While not specifically stated, it is going to be important for **Property Managers** to be aware of these Guidelines when a managed property is up for sale.

The REIV asked the specific question about the responsibility/liability for **Auctioneers** regarding material facts.

#### **CAV response:**

If an auctioneer (who is not the listing agent and is essentially a third party) is asked a question and they do not have the knowledge to answer it, then they cannot be said to have knowingly concealed a material fact. As a matter of common practice, an auction could be interrupted, and queries could be referred to the listing agent or vendor before the auction recommences.

### The Change

The fundamental change to law is that it is now a serious offence to **knowingly** conceal a material fact about properties for sale. The courts will consider the Guidelines document in determining whether the information in question was material or otherwise.

Importantly, agents must now investigate any questions posed by potential purchasers in the lead up to the sale and provide an answer.

It will no longer be sufficient to respond that you do not know.

## DEFINING A MATERIAL FACT

A material fact is a fact that would be important to a potential purchaser in deciding whether to buy any property. Commonly, some information about a property for sale may only be known to the person who has owned and/or occupied that property and may not be known to potential purchasers even if they have personally inspected the property.

### The detail

The REIV has been successful in influencing some updates to the earlier draft guidelines proposed by CAV. Below are excerpts to highlight certain key aspects of the Guidelines. Where clarification has been sought from CAV regarding certain phrases/ terms, the CAV feedback is also noted.

1. **Guideline:**

***“Prior tests or investigations have revealed (or the vendor or agent otherwise knows of) a defect in the structure of the building, a termite infestation, combustible cladding, asbestos (including loose-fill asbestos insulation) or contamination through prior uses of the land.”***

- The REIV effected a change to the Guidelines to clarify that this material fact does not need to be disclosed if fully remediated unless a question about that material fact is specifically asked by a potential purchaser.
- The REIV also effected a change to the Guidelines in circumstances where the property is a ‘fixer-upper’. Only material facts that are not clearly visible (including underlying causes of visible defects) would need to be disclosed. At the REIV’s suggestion an example of this was included in the Guidelines (see 2).

2. **Guideline:**

***“The underlying cause of an obvious physical defect is not readily apparent upon inspection (for example, whilst a large uncovered crack in a wall would be obvious to a purchaser upon inspection, the underlying reason for the crack, such as defective stumping, may not).”***

- This paragraph was inserted at the insistence of the REIV.

3. **Guideline:**

***“There has been a significant event at the property, including a flood, or a bushfire”***

- This example was amended at the request of the REIV however, we believe it remains too vague. Agents are being asked to ‘fill the void’ of the failure of the planning scheme accurately providing the requisite information regarding flood and/or bushfire prone areas.
- Furthermore, there is no clarity around near-misses such as ember attacks from nearby properties or whether a fire or flood on a nearby or adjacent property, but not on the subject property is a material fact. The REIV recommends a conservative approach to this issue.
- Additionally, the provision of only two examples of significant events is too vague Does this provision extend to say earth tremors, drought, rodent infestation, insect plagues, etcetera?

- REIV sought clarity around how long ago the occurrence of one of these events remained a material fact. In our view a fire or flood some (say) 20 or 30 years ago has little or no relevance.

**CAV response:**

A vendor (or their agent) should disclose all known material facts about a property to a potential purchaser, regardless of how long ago a certain event occurred. In the absence of such knowledge vendors and agents cannot be said to have knowingly concealed a material fact.

4. **Guideline:**

***“There is a history of pesticide use in the event the property had been used for horticulture or other agricultural purposes.”***

- REIV also sought clarity around how far back this provision applied. CAV provided the following response:

**CAV response:**

In the absence of such knowledge vendors and agents cannot be said to have knowingly concealed a material fact. Vendors and their agents are not required to carry out their own investigations to find out about past uses of land.

5. **Guideline:**

***“There are restrictions on vehicular access to a property that are not obvious during a property inspection (such as truck curfews or where access is via an easement that is not apparent on the Certificate of Title or plans).”***

- The examples provided above were included into the document at the insistence of the REIV. Please note that these examples are not exhaustive and other examples could be relevant as a material fact.

6. **Guideline:**

***“Facts about the neighbourhood surrounding the property which may not be immediately apparent upon inspection (such as sinkholes, surface subsidence, development proposals) that would likely affect the use and enjoyment of the property to a greater extent than the usual disturbances and inconveniences of occupying land of the kind and in the local area of the land being sold.”***

- The REIV argued strongly against this provision on that basis that the word ‘neighbourhood’ was too vague and it was unclear what distance this was applicable for and how broadly this enquiry must extend.

**CAV response:**

Given that there is no one size fits all radius for the term ‘neighbourhood’, it is not proposed that this example be amended. To set any type of distance would be overly prescriptive in a document that provides guidance only.

- The REIV accepted the examples of sinkholes and surface subsidence however strongly opposed the inclusion of development proposals in the same paragraph. In our view a development proposal is an entirely different issue and is not one that has visibility. In our view it should be a matter for

which the potential purchaser makes their own enquiries, or this should be highlighted as a standalone guideline.

7. **Guideline:**

***“Building work or other work done without a required building permit, planning permit or that is otherwise illegal.”***

- The REIV had no issue with this matter but was able to effect a change in terminology from building approval to building permit given that this terminology changed in 1994.

8. **Guideline:**

***“The property during the current or previous occupation has been the scene of a serious crime or an event which may create long-term potential risks to the health and safety of occupiers of the land, such as:***

- ***extreme violence such as a homicide***
- ***use for the manufacture of substances such as methamphetamine, or***
- ***a defence or fire brigade training site involving the use of hazardous materials.”***

- The REIV requested an extensive rewrite of this part on the basis that there is no connection between a previous act of violence and a long-term potential risk to the health and safety of occupiers. Consequently, the point 9 below was included for clarity. CAV also provided the following response:

**CAV response**

There is a community expectation that homicides that have occurred at a property be disclosed to potential purchasers. Other known acts of extreme violence should be disclosed if a potential purchaser makes a specific enquiry. While these circumstances may not be a physical barrier to the use of the property, they may materially affect a purchaser’s decision to buy the land.

9. **Guideline:**

***“Defects and damage arising from prior significant events of the kind specified above, and contamination from prior uses of the land will not be considered material if they have been fully remediated, and no further repairs or other works (including ongoing work) will need to be carried out in the future. However, if a potential purchaser asks a specific question relating to defects and damage arising from prior significant events, or from contamination arising from prior uses of the land, those questions must still be answered by the vendor fully and frankly and to the best of the vendor’s knowledge.”***

- At the request of the REIV this paragraph has been changed substantially from the original which was extremely vague and unworkable.



## WHEN TO DISCLOSE MATERIAL FACTS

During the consultation, REIV questioned what appeared to be the removal of the common law principle of *caveat emptor* (let the buyer beware) and amounted to a fundamental shift in the vendor/purchaser relationship.

Consequently, CAV inserted the following paragraphs into the Guidelines:

- Vendors are not required or expected to carry out tests and investigations of the property to determine if there are any unknown problems that ought to be disclosed, other than as may be required to prepare a section 32 statement.
- However, if a potential purchaser asks a vendor or a vendor's agent a question about a property, before that property is sold, the vendor or the vendor's agent must answer that question fully and frankly and to the best of their knowledge.
- If the vendor or a vendor's agent has no knowledge of the matters raised by the potential purchaser, they can advise that potential purchaser that they do not know

What is not explicitly stated is that, CAV and potentially the courts, will expect estate agents to ask questions of the vendor posed by a potential purchaser.

Section 32 documentation could duplicate some of the examples of material facts provided in the Guidelines. However, not all matters that may be material facts are included in Section 32 of the SoLA, and if a matter that is a material fact does overlap with the disclosures required under Section 32, a vendor (or their agent) should still answer all inquiries made by a potential purchaser fully and frankly about that material fact, if asked. If a material fact is not caught by Section 32, it should be disclosed by other means.

## NEXT STEPS

The REIV understands that the Guidelines are far from ideal and will continue to pursue changes to the Guidelines through the Director of Consumer Affairs.

To assist in doing so your feedback on any matters or difficulties would be appreciated.

The REIV will soon be releasing a Checklist that Members may use for assistance with adhering to the Material Fact Guidelines.

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