

REIV's response to Material Fact Guidelines

Sale of Land Amendment Act
2019

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REIV

INTRODUCTION

The Real Estate Institute of Victoria (REIV) is the peak professional association for the real estate industry in Victoria.

Our members specialise in all facets of real estate, including residential and commercial and industrial leasing and sales, auctions, business broking, buyers' agency, property management, owners' corporations and valuations.

REIV represents more than 80 per cent of these professions.

These businesses employ more than 15,000 people in Victoria in a market that handles around \$76 billion in transactions totalling 20 per cent of GSP.

Introduction

The REIV does not support the Guideline document in its current form and recommends a comprehensive redraft and further consultation prior to its introduction.

The REIV suggest that section 12(d) of the *Sale of Land Act 1962* (“Act”) clearly puts the determination of what is a material fact in the hands of the court. The court ‘may’ have regard to the guidelines. It is our submission that the detail and extent of the guideline will make it difficult for vendors, agents and real estate agents to know or even anticipate the extent to which the court is actually likely to give regard to the guidelines.

The REIV also expresses concern that the intent of the legislation seems to be to manage the issue of material facts through deterrence under pain of substantial fines and/or imprisonment. We would argue that a better approach would be for the guidelines to be not as broad and to be more specific, providing guidance on critical issues rather than a range of esoteric principles.

More detailed responses are below in the areas of:

- The use of the word ‘agent’
- The failure of Section 32s
- Comments on specific examples given in the draft guidelines
- A shift in the balance of responsibility
- Responsibility of auctioneers

The use of the word ‘agent’

The Director would be aware that section 31(3) of the Act specifically differentiates an ‘agent’ from an ‘estate agent’ or ‘licensed estate agent’. In *Tan v Russell* 2016 VSC 93 Justice Cameron drew a distinction between an ‘agent’ at law as referred to in section 31 of the Act and a real estate agent.

While the term ‘agent’ is not defined in the Act, it is clear that this could extend to a solicitor or conveyancer acting for the vendor, or indeed any person acting for the vendor.

Throughout the guideline the use of the word ‘agent’ is used repeatedly and in our view inconsistently, unreasonably and unfairly focussing on real estate agents, potentially causing confusion and misinterpretation. The REIV contends that the domain of knowledge of material facts is not limited to vendors and estate agents.

Section 12 (d) of the Act creates an offence that could be committed by ‘any person’. The new section 12A of the Act provides for “...guidelines to assist vendors of land and their agents...”. The terminology specifically uses the terminology ‘agent’ rather than ‘estate agent’ or ‘licensed estate agent’.

It is REIV’s contention that Parliament’s intention was clear in that the application of the ‘guidelines’ should extend to any person acting as an agent of the vendor.

The REIV questions how the conflict a lawyer might face in terms of the requirement to disclose material facts and their lawyer/client confidentiality obligations is to be reconciled.

We have highlighted the various usage with different colours to provide clarity and provided commentary following each usage on the appropriateness or otherwise of the terminology.

Page 1

“The purpose of these guidelines is to assist vendors of land and their agents (including estate agents) to understand what a **material fact** is likely to be under section 12 (d) of the Act.”

Comment: It is clear here that the purpose is to assist vendors and their agents. The REIV questions why estate agents are singled out for mention as being included in the term ‘agents’. The REIV argues that the parenthesis should either include solicitors and conveyancers or be deleted.

“The Amendment Act ... The previous wording of section 12 (d) of the Act ... although a vendor or agent is generally not required to advise a potential purchaser of any serious defect...”

Comment: The REIV presumes that this use of the term ‘agent’ extends to other parties such as conveyancers or solicitors.

“The change to section 12 (d) means that it is an offence if a vendor or agent knowingly conceals a material fact ... It is sufficient if a vendor or agent withholds a material fact which the vendor or agent knows to be material, with the ...”

Comment: The REIV presumes that this use of the term ‘agent’ extends to other parties such as conveyancers or solicitors.

Page 2

“This information imbalance makes it essential for the vendor or their agent to be obliged to disclose material facts known to them to a potential purchaser of the land.”

Comment: The REIV presumes that this use of the term ‘agent’ extends to other parties such as conveyancers or solicitors.

“A fact is not an inuendo, gossip or mere speculation. However, an opinion may be a “material fact”, if it is an expert opinion that is honestly held on reasonable grounds, and the vendor or agent have knowledge of that expert opinion.”

Comment: The REIV presumes that this use of the term ‘agent’ extends to other parties such as conveyancers or solicitors.

“Generally: a fact that an average, reasonably informed purchaser with a fair-minded understanding of the property market, including the role of an estate agent, would generally regard as *material* in their decision to buy land (examples are provided below).

Comment: The REIV again questions why estate agents are singled out for mention as having a knowledge of the property market. The REIV argues that the inclusion should either extend to solicitors and conveyancers or be deleted. The REIV will also make comment below regarding the construction of this example. (*see below)

Specifically: If a fact about land is known by the vendor (or the vendor's agent, including an estate agent) to be important to a specific purchaser, it can be material, even if other agents or consumers would not generally consider that fact to be important or of significance to them: This knowledge could arise if (for example) a particular purchaser:

- (a) has a specific question about the land or the vendor or the vendor's agent (including their estate agent), and/or
- (b) where a purchaser informs the vendor/agent of their intended use of the land."

Comment: The REIV notes that the term 'agent' is used variously within the one paragraph. The REIV questions why estate agents are singled out for mention as being included in the term 'vendor's agent' where twice appearing. The REIV argues that the parenthesis should either include solicitors and conveyancers or be deleted. Furthermore, the additional use of the term 'agent' where twice appearing is confusing in the context of the previous use of the term 'vendor's agent (including their estate agent)'. Again, the REIV assumes that this use of the term 'agent' extends to other parties such as conveyancers or solicitors.

"Vendors or agents who have knowledge of material facts cannot rely on purchasers becoming aware of them through making 'usual inquiries' or following the Due Diligence Checklist to avoid disclosure. General examples of material facts about land which are known to the vendor or agent but which may not be obvious to the potential purchaser include (but are not limited to) circumstances where:

- Prior tests or investigations have revealed (or the vendor or agent otherwise knows of) a defect"

Comment: The REIV presumes that this use of the term 'agent' extends to other parties such as conveyancers or solicitors.

Page 3

"Agents (or vendors where they are not using an agent) should disclose all known ..."

Comment: The REIV presumes that this use of the term 'agent' extends to other parties such as conveyancers or solicitors. It is more likely however, that this reference to agent is meant to be a reference to an estate agent.

"However, specific disclosure of a material fact to a particular purchaser will be required where the vendor or agent knows that the material fact has not come to the attention of the purchaser by other means."

Comment: The REIV presumes that this use of the term 'agent' extends to other parties such as conveyancers or solicitors.

Page 4

"They should carefully consider all information ... and disclose any known material facts to their estate agent prior to the marketing of the property. Vendors should answer all inquiries about the property put to the vendor by purchasers through their agent as fully and frankly as possible."

Comment: The REIV questions whether the disclosure of 'any known material facts' is intended to only apply to the vendor's estate agent. The REIV also questions whether the use of the specific term 'agent' (highlighted in green) is to extend to other parties such as conveyancers or solicitors.

“If vendors disclose material facts to their **agent**, acting reasonably and diligently, they have discharged their obligation to not knowingly conceal material facts, and the burden of disclosure of those material fact falls upon the **agent**.”

Comment: The REIV presumes that this use of the term ‘agent’ extends to other parties such as conveyancers or solicitors.

“If the vendor is selling the property without an **agent**, the vendor should”

Comment: The REIV cites some difficulty in interpreting the intention of this phrase and questions whether it is intended to only apply in circumstances where the vendor is selling the property without engaging an estate agent, or whether term ‘agent’ extends to other parties such as conveyancers or solicitors.

“What should **estate agents** do?”

“**Agents** should discuss with vendors any material facts that are likely to be the subject of statements or representations by the **agent** in the course of marketing the property. During this process, it is important for the agent to inspect the property ...”

Comment: The REIV argues that for consistency and clarity, the term ‘agent’ where twice appearing should be amended to read ‘estate agent’ notwithstanding its usage is in a section devoted to the role of estate agents.

“The **agent** should answer all inquiries by purchasers and their consultants as fully and frankly...”

Comment: The REIV argues that for consistency and clarity, the term ‘agent’ should be amended to read ‘estate agent’ notwithstanding its usage is in a section devoted to the role of estate agents.

“These pro-active steps are also required of **estate agents** under the *Estate Agent (Professional Conduct) Regulations 2018* which require an **agent** to act fairly, honestly, in good faith and in the vendor’s best interests. It is also best practice if the **estate agent** provides prospective purchasers with a copy...”

Comment: The REIV notes and highlights the appropriate use of the term ‘estate agent’ and the inconsistent use of the term ‘agent’. The REIV notes that referenced regulation 10(1) and regulation 11 of the *Estate Agent (Professional Conduct) Regulations 2018*, both repeat the full term of ‘estate agent’.

The REIV is concerned that the vast majority of the responsibility for disclosure of material facts is being imposed upon estate agents, and that other ‘agents’ or ‘consultants’ are being protected from their responsibilities in this matter. It is possible that a vendor could disclose a material fact to a conveyancer or solicitor and not to an estate agent. If this material fact is not disclosed in the Section 32 or the Contract of Sale it may not be known to the estate agent.

The vendor may assume that, having made the disclosure to their solicitor or conveyancer, they do not need to disclose it to their estate agent and wrongly believe that they have fulfilled their obligation and form a mistaken recollection of notifying the estate agent, exposing the estate agent to prosecution.

The REIV recommends that the Director consider developing a mandatory vendor checklist to be completed by the vendor or their agent during the process identifying any material facts and requiring this to be provided to the estate agent.

On the second page of the Draft Guidelines there is reference to the Due Diligence Checklist. Does the Director intend to include the 'material facts' rights and obligations in a revised version of the Checklist? While the REIV acknowledges that sole reliance on the Checklist will not absolve an agent from their responsibilities, inclusion in the Checklist of relevant matters would assist in consumer protection.

The Director might also consider reintroducing *Section 1 Table Seventh Schedule Transfer of Land Act 1958* as a further safeguard.

*As indicated previously the REIV makes comment regarding the construction of the sixth example above. The phrase, "*including the role of an estate agent*" does not make sense in the context of this sentence. The REIV presumes that the intention is to link understanding of the property market to the role of an estate agent. That is not how the sentence reads and we respectfully submit it is poorly constructed.

The failure of Section 32s

The REIV notes the abject failure of Section 32 documentation in protecting the prospective purchaser. The level of expertise around the preparation of this documentation is greatly varied and we have seen many examples of incomplete and inaccurate information.

A future consideration to protect all parties to the transaction might be to require the mandatory inclusion of a building inspection report, and pest inspection report as is standard in most other States.

The early and professional completion of the section 32 should be expedited to ensure that it is available prior to the commencement of any advertising for the sale of a property.

The Director would be aware that Section 32 documentation, if completed correctly, would provide a greater level of certainty around the disclosure of material facts. Many of the requirements of the Section 32 documentation would satisfy (and indeed duplicate) a large number of the examples provided in the guideline document.

The REIV considers it unfortunate that in the process of making the *Sale of Land Amendment Act 2019* consideration was not given to making sweeping amendments to the requirements of Section 32. In our view, the path taken unfairly exposes the estate agent to greater liability and significantly increased penalties under a criminal prosecution rather than seeking a lasting solution to the issue. With due respect, this level of accountability being applied to an estate agent is far beyond the likely skill set of an estate agent thereby placing them in a precarious legal position.

Comments on specific examples given in the draft guidelines

- 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-filled asbestos insulation) or contamination through prior uses of the land.

Comment: The REIV generally has no issue with these matters being considered as material facts. The REIV notes the qualifying comments in the guideline document that there is no requirement to disclose such defects if fully remediated and no further work is required to be carried out. For clarity the REIV recommends that this qualifier be included in this section.

One proviso in our acceptance of this example is clarification as to the extent of reporting that is required. For example, ‘fixer-upper’ or ‘project’ properties are often sold as exactly that; a property requiring substantial repair and renovation. If the work to be carried out to repair and/or renovate is substantial, is the vendor or their agent required to list every defect? This would be a nonsense and unworkable. Please refer to our later comments on the principal of ‘*caveat emptor ...*’.

- There have been significant events at the property, including a flood, or a bushfire.

Comment: The REIV cannot support this item in its current form. In both cases, the property would or should be designated as being in a flood prone area and/or a bushfire prone area (with the requisite BAL level easily identifiable). If it is not, then that is a failure of the local council, and real estate agents should not be required to ‘fill the void’ of the failure of other groups or individuals.

The item as written is too vague – for example, what is the position on near-misses? Is it a material fact if there was a bushfire event on the adjoining or adjacent property, or in the neighbourhood or district but not on the property for sale? What constitutes a bushfire; does it extend to ember-caused damage to one or two trees from a nearby fire? How far back in time is it relevant? Again, is this meant to be considered *ad infinitum*? A flood or fire some 20 to 30 years ago or more has little relevance. Furthermore, the example of significant events is too vague with only two ‘including’ examples. Does this extend to say earth tremors, drought, rodent infestation, insect plagues, etcetera.

Furthermore, the guideline as written, requires more than one event. If it is the intention to trigger mandatory disclosure of a single event, then the wording should be amended to read “There has been a significant event at the property...”

- There is a history of pesticide use in the event the property had been used for horticultural or other agricultural purposes.

Comment: The REIV generally has no issue with this matter being considered as a material fact. However, the REIV questions whether this is intended to extend *ad infinitum*, that is to say, if the property was used for this purpose decades earlier but has not been so used for the past (say) twenty to thirty years.

- There are restrictions on vehicular access to a property that are not obvious during a property inspection.

Comment: The REIV generally has no issue with this matter being considered as a material fact but is at a loss to identify a practical example of this. If we have this difficulty, it may be prudent to provide further information.

It is noted that Section 32C (c) of the *Sale of Land Act 1962* requires a Section 32 Statement to contain information regarding lack of access by road. As noted previously it is unfortunate that this provision was not amended during the making of the *Sale of Land Amendment Act 2019*. This would have obviated the need to have this issue considered as a material fact.

- 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.

Comment: The REIV cannot support this item in its current form. The examples of sinkholes and surface subsidence are accepted. The inclusion of development proposals is inappropriate in our view. The examples refer to what might not be immediately apparent upon inspection and for that purpose the inclusion of sinkholes and surface subsidence are accepted; a development proposal is not an inspection item but rather a matter of investigation or enquiry. Furthermore, it is unclear how broadly this enquiry must extend geographically, as work associated with future developments can impact on the quiet enjoyment and amenity, many blocks away.

The REIV recommends, that if the Director is insistent on including development proposals as a material fact (highlighting the absolute failure of the section 32 and conveyancing process) then it should be included in a separate section or example, and worded accordingly with much clarity on its applicability.

- The property during the current or previous occupation has been the scene of a serious crime or event which may create long-term potential risks to the health and safety of occupiers of the land, such as:
 - a) extreme violence (for example, a homicide),
 - b) use for the manufacture of substances such as methylamphetamine, or
 - c) a defence or fire brigade training site involving the use of hazardous materials.

Comment: The REIV supports in principle this matter being considered as a material fact. The only question we raise is the uncertain connection of a scene of a murder (for example) to the creation of a long-term potential risk to the health and safety of occupiers of the land. For that reason, we recommend a re-write of this matter.

- Building work or other work done without a required building approval, planning permit or that is otherwise illegal.

Comment: The REIV generally has no issue with this matter being considered as a material fact however points to the terminology of 'building approval' rather than 'building permit'. Building approvals have not been issued in Victoria for more than 25 years.

- Defects and prior significant events of the kind specified above, and contamination from prior use of the land may be considered material if:
 - a) they have not been fully remediated;
 - b) there is a risk that further repairs or other works (including ongoing work) will need to be carried out in the future; or
 - c) a purchaser makes inquiries as to the occurrence of such defects or damage in the past and/or any works done to the land.

Comment: The REIV seeks clarity around the wording of this provision. It refers to defects and prior significant events ... and contamination. While it is clear to us how defects and contamination can be remediated, it is unclear as to how a prior significant event (using the examples of flood or bushfire) can be remediated. The inclusion of prior significant events appears redundant.

The REIV also seek clarification as to the extent of the provision regarding a purchaser making inquiries under sub paragraph (c) – does this, as it is stipulated, only extend to inquiries about the occurrence of defects or damage and/or any works done to the land? As written, it does not extend to inquiries about significant events or most of the other examples provided in the guideline.

A shift in the balance of responsibility

If it is the intention of government that the vendor, vendor's agent or estate agent do the work of the prospective purchaser in terms of investigation or enquiry then the applicability of the principle of *Caveat emptor, quia ignorare non debuit quod jus alienum emit* ("Let a purchaser beware, for he ought not to be ignorant of the nature of the property which he is buying from another party.") is well and truly voided. The REIV argues that this is an attempt to significantly alter or remove this common law principle and amounts to a fundamental shift in the vendor/purchaser relationship. The REIV cannot support this shift in the balance of responsibility.

Responsibility of Auctioneers

A question has been raised by our membership regarding the responsibility attached to auctioneers under this legislation. Is it envisaged that an auctioneer (who is not the listing estate agent) will have a duty to identify and disclose material facts as well or are they able to refer specific questions on the day of the auction (or even during the auction) to the listing estate agent or to the vendor?

If a question is asked at the auction or during the auction pertaining to a material fact, is the auctioneer required to stop or interrupt the auction in order to seek an answer from the vendor or their estate agent? In many cases an auctioneer service is provided that is not tied to the listing estate agent. A requirement for an auction to be interrupted by the asking of a question during the auction would be a significant disruption and could jeopardise the completion of the auction. This is particularly so given that a prospective purchaser might not ask a question in the lead-up to the auction and use the asking of a specific, never-before raised question on auction day in order to sabotage the auction process.