

CHANGES TO SWIMMING POOL COMPLIANCE: PASSING THE BUCK WITH CERTIFICATES OF NON-COMPLIANCE

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The *Swimming Pools Act 1992* (NSW) ('the Act') has undergone a series of changes since 2012 culminating most recently in the new sale and leasing requirements that commenced on 29 April 2016.

Background and key changes

Some of the key changes since 2012 have included an obligation upon each owner to register their pool on a newly established online government register of swimming and spa pools, the introduction of mandatory and periodic inspections by local authorities (eg councils), and new sale and leasing requirements affecting pool owners. The sale and leasing requirements were deferred on two occasions but will now commence on 29 April 2016. Previously under the regulations, pool owners seeking to sell or lease their premises, were required to obtain a valid certificate of compliance or a relevant occupation certificate accompanied with a registration certificate evidencing that the pool had been registered on the online register.

During the deferral period, the Building Professional Board established a new category of private certifiers now known as 'E1 Certifiers' to complement council inspections and increase the number of private inspectors who can issue certificates of compliance under the Act. For a list of private certifiers who are authorised to issue certificates see: www.swimmingpoolregister.nsw.gov.au/ In September 2015 the NSW Government commissioned a review of pool barrier requirements in advance of the commencing date. After submissions from key stakeholders (including the Law Society of NSW), the Minister of Local Government announced that the proposed sale and leasing requirements would proceed as scheduled on 29 April 2016 subject to some key changes as follows:

- all properties with a swimming pool being sold or leased on or after 29 April 2016 will require a valid certificate of compliance or relevant occupation certificate (with a registration certificate);

Snapshot

- **New sale and leasing requirements commenced 29 April 2016. Contracts for sale of land with pools must include a certificate of compliance, occupation certificate (with registration certificate) or a certificate of non-compliance.**
- **Vendors can now shift the responsibility of obtaining the certificate of compliance to the purchaser.**
- **Purchasers who complete a sale contract with a certificate of non-compliance attached will have 90 days to carry out the rectification works.**
- **A new exemption applies to strata and community title schemes with more than two lots and 'off the plan' contracts.**

- in the case of sales, where a certificate of compliance cannot be obtained, vendors will now be able to shift the responsibility of obtaining the certificate of compliance to the purchaser by attaching a certificate of non-compliance to the sale contract;
- purchasers who complete a sale with a certificate of non-compliance attached to the contract will have 90 days from settlement to rectify the non-compliance issues;
- a new exemption to the sale and leasing requirements will apply to strata and community title schemes comprised of more than two lots; and
- a new exemption to the sale requirements will apply to off the plan contracts.

Various amendments have since been made to the various *Swimming Pools*, *Conveyancing (Contract for Sale of Land)*

and *Residential Tenancies* regulations to give effect to the changes.

Certificates of non-compliance

Under s 22C of the Act an owner of a pool may at any time request their local authority or an accredited certifier to carry out an inspection for the purposes of obtaining a certificate of compliance.

An inspection by a local authority must be carried out within 10 business days where an inspection is requested by the owner for the purposes of lease or sale. If the local authority or accredited certifier is not satisfied that the requirements have been met, then a certificate of non-compliance must be issued within seven days (*Swimming Pools Regulation 2008* (new) reg 18BA). It must be in the prescribed form and must state amongst other things, whether in the inspector's opinion, the pool poses a significant risk to public safety. It is anticipated that certificates of non-compliance will be generated through the NSW Swimming Pool Register online and will be available for public search on the web site.

The inspector must also issue the owner a separate written notice setting out (amongst other things) the reasons why the requirements for a certificate of compliance have not been met and the steps to be carried out to meet those requirements (s 22E of the Act and reg 18B).

Changes to prescribed documents

As of 29 April 2016, new contracts for sale of land on which there is a swimming pool, must have one of the following attached:

- a valid certificate of compliance issued for the pool; or
- a relevant occupation certificate (together with a registration certificate); or
- a valid certificate of non-compliance (*Conveyancing (Sale of Land) Regulation 2010* (NSW) Schedule 1 (new) clause 14A).

A certificate of compliance remains valid for a period of three years and a certificate of non-compliance remains valid for a period of one year from the date the certificates are issued. A certificate of non-compliance ceases to be valid once the certificate of compliance issues.

A relevant occupation certificate is one issued under the *Environmental Planning and Assessment Act 1979* that is less than three years old and authorises the use of the pool. These certificates are prescribed documents for the purposes of contracts for sale of land on which there is a swimming pool (*Conveyancing Act 1919* (NSW) s 52A(2)(a), *Conveyancing (Sale of Land) Regulation 2010* (NSW) reg 4, and Schedule 1 (new) clause 14A.)

Effect of attaching a certificate of non-compliance to a contract for sale of land

As stated earlier, it is now possible for a vendor to pass on the responsibility of obtaining the certificate of compliance to a purchaser by attaching a certificate of non-compliance to the contract for sale of land.

The new reg 18B operates for the benefit of purchasers and gives them 90 days after completion of the sale to rectify the non-compliance issues, (so long as the certificate of non-compliance issued at sale did not state that the pool poses a significant risk to public safety).

There is nothing in the new regulation that operates to prevent a local authority from issuing an upgrade order or an order requiring rectification works to be carried out by the vendor under ss 23 and 23A of the Act following the issue of a certificate of non-compliance. Notwithstanding, it appears the intention of the regulation to provide the vendor a grace period of one year following the issue of a certificate of non-compliance where the vendor applied for the certificate for sale purposes, unless the certificate states that the pool poses a significant risk to public safety.

If the vendor has not sold the property within one year of obtaining the certificate of non-compliance, the vendor will need to apply for a new certificate in order to continue to market the premises for sale. If the certificate of non-compliance states that a pool poses a significant risk to public safety, a private certifier must immediately notify the relevant local authority (s 24E4(a)). Upon receiving a copy of the notice, the local authority is then able to utilise its existing powers under the Act to ensure that the swimming pool is brought into compliance (ss 23 & 23A).

Drafting tips and the effect of notices issued under s 22E and reg 18B

Practitioners reviewing a purchase contract that includes a certificate of non-compliance should also request the vendor provide a copy of the accompanying s 22E or reg 18B notice issued by the pool inspector which specifies the non-compliance issues and rectification works required.

A review of the notice will give the prospective purchaser the opportunity to cost and scope the rectification works for consideration before agreeing to the purchase price.

Practitioners preparing sale contracts with a certificate of non-compliance should also consider the implications of the notice issued by the pool inspector under s 22E or reg 18B and the operation of standard printed clause 11 titled 'Compliance with Works Orders' of the Law Society & REINSW Contract for Sale of Land – 2005 edition and Contract for Sale and Purchase of Land - 2014 edition.

Clause 11.1 generally requires the vendor to comply with any valid notice, order or direction made on or before the contract date requiring work to be done or money to be spent on or in the property. The purchaser must comply with any other notice, order or direction if the contract is completed. The clause operates subject to any other provision of the contract. Where it is intended to require the purchaser to comply with rectification works following completion, an overriding provision should be inserted into the contract to that effect.

New exemption for strata and community schemes of more than two lots

Strata and community schemes will continue to be subject to mandatory inspections by councils every three years ensuring a valid certificate of compliance is maintained by the scheme at all times (s 22B of the Act).

The regulations have been modified however, introducing a general exemption to the new sale and leasing requirements with respect to the sale or lease of a lot in a strata or community scheme where the strata or community scheme comprises more than two lots (*Conveyancing (Sale of Land) Regulation 2010* (NSW) Schedule 1 (new) clause 14A(2) & *Residential Tenancies Regulation 2010* (NSW) Schedule 1 (new) clause 40A).

New exemption in 'off the plan' contracts

The new regulations also introduce a general exemption to the sale requirements with respect to 'off the plan' contracts as defined in s 66ZL of the *Conveyancing Act 1919* (NSW). This new exemption clarifies previous uncertainty with regard to the requirements for 'off the plan' contracts due to the general application of the Act to 'proposed pools'.

Other tips and traps for practitioners

For more tips and traps concerning the general application of the new sale and leasing requirements please review 'Essential Update on Swimming Pool Compliance', *LSJ* February 2015 p92. This earlier article contains a more detailed discussion of the leasing requirements, consequences of failing to comply with the new sale and leasing requirements, and practical issues arising from cancellation of certificates, certificates of compliance issued subject to exemptions, availability of checklists and council response times. **LSJ**

2016 Edition of the Contract for Sale and Purchase of Land

A new edition of the Contract for Sale and Purchase of Land is being prepared for release in June 2016.

It will address the Commonwealth's scheduled commencement of the Foreign Resident Capital Gains Withholding Payments measure (under new sub-div 14D, sch 1 to the *Taxation Administration Act 1953*), which is due to commence on 1 July 2016.

The new measure will require significant changes to conveyancing practice for the transfer of all land with a market value at or above \$2 million. Australian resident vendors of real property with a market value of \$2 million or above will need to apply for a clearance certificate from the ATO and provide this to the purchaser before settlement. Without a clearance certificate, the purchaser must withhold 10% of the purchase price on settlement, and remit this amount to the ATO.

Other legislative changes are also being addressed in the new edition of the Contract, including recent changes to vendor disclosure for the sale of properties with swimming pools.

See **Monday Briefs** for more updates on the release of the 2016 edition, and the future sales of previous electronic and hard copy editions.