

Material Fact Guidelines

Sale of Land Act 1962

Section 12(d)

The *Sale of Land Amendment Act 2019* (Amendment Act) was passed by the Victorian Parliament on 28 May 2019 and received the Royal Assent on 4 June 2019. The Amendment Act makes a number of amendments to the *Sale of Land Act 1962* (the Act), including an amendment to section 12(d) of the Act.

Purpose

Section 12A of the Act (as amended) says:

The Director of Consumer Affairs Victoria may make guidelines to assist vendors of land and their agents to understand what a material fact is likely to be for the purposes of section 12(d).

A court may have regard to any guidelines made under subsection (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.

Context

Section 12(d) of the Act (as amended) provides:

Any person who, with the intention of inducing any person to buy any land—

*(d) makes or publishes any statement promise or forecast which he knows to be misleading or deceptive or **knowingly** conceals any material facts or recklessly makes any statement or forecast which is misleading or deceptive*

shall be guilty of an offence against this Act...

The penalty for breaching section 12(d) of the Act is 120 penalty units or up to 12 months imprisonment.

The Amendment Act replaces the word “fraudulently” with “knowingly”. The previous wording of section 12(d) of the Act reflected the common law tort of deceit where, although a vendor or agent is generally not required to advise a potential purchaser of any serious defects in the property of which they are aware, they cannot fraudulently (meaning, knowingly with intent to deceive) actively conceal defects. In addition, a vendor may commit the tort of deceit if they fail to answer any question about the structural soundness or quality of the property honestly and completely.

The change to section 12(d) means that it is an offence if a vendor or agent knowingly conceals a material fact about land for sale, with the intention of inducing a potential purchaser to buy the land. It is not necessary to show that anything active was done to conceal the material fact, although doing so knowingly will still be an offence. It is sufficient if a vendor or agent withholds a material fact which the vendor or agent knows to be material, with the intention of inducing a potential purchaser to buy the land.

As amended, section 12(d) of the Act supports a purchaser to make a fully informed decision before they buy land.

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.

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.

What is a material fact?

A material fact is a fact that would be important to a potential purchaser in deciding whether or not to buy any land. In the context of a proposed sale of land, a material fact is one that influences a purchaser in deciding whether or not to buy any land at all, or to buy land only at a certain price.

A fact is not 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.

Failure to disclose a fact alone is not sufficient to establish an offence under s12(d). The fact must be material. A fact can be 'material' in two ways:

1. 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).
2. 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 and 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) asks a specific question about the land of 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.

Further indications which would be relevant to determining whether something is a material fact include:

- whether the fact is only known by the vendor
- the reaction of other potential purchasers to the fact, including whether knowledge of the fact may impact a potential purchaser's willingness to buy land, and
- whether the fact results in the property being in a rare or unusual category or position.

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 a 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 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 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);
- there has been a significant event at the property, including a flood, or a bushfire,
- there is a history of pesticide use in the event the property had been used for horticulture or other agricultural purposes,
- 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),
- 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,

- building work or other work done without a required building permit, planning permit or that is otherwise illegal,
- 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 methylamphetamine, or
 - a defence or fire brigade training site involving the use of hazardous materials.

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.

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.

Positive enhancements or improvements made to a property such as renovations are likely to be disclosed in the course of marketing land for sale. Positive information about land for sale, if withheld, is not of its nature the kind of information which is likely to "induce" a sale.

When to disclose material facts

Estate agents (or vendors where they are not using an estate agent) should disclose all known material facts to potential purchasers as soon as they indicate that they are considering purchasing the property. They must also make continuing disclosure if further material facts become known until the property is sold.

Generally, material facts will not be concealed from purchasers if they are disclosed:

- in marketing material or information statements; or
- in a section 32 statement or contract of sale; or
- on a physical inspection of the property where they are clearly visible; or
- by specific disclosures made to particular purchasers in the course of negotiations; or
- before the start of a public auction.

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.

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 should vendors do?

Vendors should prepare the property for inspection by potential purchasers without taking any steps to hide defects or any other important feature which would otherwise come to the attention of someone doing an inspection. They should carefully consider all information known to them or disclosed to them by their solicitor or conveyancer after having conducted the usual searches and inquiries for a section 32 statement 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.

If vendors disclose material facts to their estate agent for the purpose of answering questions asked by potential purchasers, acting reasonably and diligently, they have discharged their obligation to not knowingly conceal material facts, and the burden of disclosure of those material facts falls upon the estate agent.

If the vendor is selling the property without an estate agent, the vendor should answer all questions about the property put to them by purchasers as fully or frankly as possible in the circumstances.

What should estate agents do?

Estate agents should discuss with vendors any material facts that are likely to be the subject of statements or representations by the estate agent in the course of marketing the property. During this process, it is important for the estate agent to inspect the property, read the section 32 statement and contract and gather information from the vendor and their solicitor or conveyancer on aspects of the property which are material to the market to assist them in accurately and honestly representing the property.

The estate agent should answer all inquiries by purchasers as fully and frankly as possible in the circumstances, including by referring those inquiries back to the vendor or the vendor's solicitor or conveyancer as necessary and diligently following up those responses.

These pro-active steps are also required of estate agents under the Estate Agent (Professional Conduct) Regulations 2018 which require an estate 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 potential purchasers with a copy of the section 32 statement and contract of sale at open for inspections and via email as early as possible in the marketing campaign.