

2017

Final Report: Seller Disclosure in Queensland

Commercial and Property Law

Research Centre

QUT LAW

Preface

The Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) was established in 2013. The Centre is a specialist network of researchers with a vision of reforming legal and regulatory frameworks in the commercial and property law sector through high impact applied research.

The members of the Centre who authored this paper are:

Professor William Duncan
Professor Sharon Christensen
Associate Professor William Dixon
Megan Window
Riccardo Rivera
Trisch Partridge

Final Report: Seller Disclosure in Queensland

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How to make a submission

Written submissions are invited in response to the proposed statutory seller disclosure regime set out in this Final Report.

The closing date for submissions is **10 November 2017**.

Where to send your submission

You may lodge your submission by email or post.

The email address for submissions is: propertylawreview@justice.qld.gov.au

Alternatively, you can post your submission to:

Property Law Review
C/- Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

These submissions will be considered by the Queensland Government in formulating a position on the Final Report's recommendations.

Privacy Statement

Any personal information you include in your submission will be collected by the Department of Justice and Attorney-General (the Department) for the purpose of undertaking the review of Queensland's property laws. The Department may contact you for further consultation regarding the review. Your submission may also be released to other government agencies as part of the consultation process.

Submissions provided to the Department in relation to this paper will be treated as public documents. This means that they may be published on the Department's website, together with the name and suburb of each person or entity making a submission. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly in the submission. However, please note that all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access applications for submissions, including those marked confidential, will be determined in accordance with that Act.

Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers any legislation resulting from this review.

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Executive Summary

The Final Report presents the recommendations of the Commercial and Property Law Research Centre (**Centre**) formulated after consideration of submissions received in response to the *Queensland Government Property Law Review Issues Paper – Seller Disclosure in Queensland (Issues Paper*, released on 12 February 2014) and the *Interim Report: Seller Disclosure in Queensland (Interim Report*, released on 21 July 2016). The Issues Paper identified a variety of difficulties associated with the current seller disclosure regime that impede its effectiveness in Queensland. The Interim Report proposed a number of recommendations to address these difficulties and sought further input from the public. All stakeholders were supportive of a more streamlined, coordinated and transparent approach to seller disclosure in Queensland provided an appropriate balance could be achieved between the interests of buyers and the potential cost burden to sellers.

In this Final Report the Centre recommends the introduction of a statutory seller disclosure regime for all sales of freehold land underpinned by several guiding principles. The aim of the guiding principles is to achieve the important reform objectives of:

1. clarity: clarifying the disclosure obligations of a seller;
2. transparency: requiring a transparent and effective form of disclosure;
3. value: providing information of value to the decision of a buyer to purchase; and
4. balance: balancing the information cost between buyer and seller.

The recommendations propose a staged reform process aimed at achieving a single statutory framework for seller disclosure in sales of land.

As part of the first stage of implementation the recommendations do not fundamentally change the information which is currently required to be disclosed in Queensland but aim to improve the conveyancing process by:

- A. initiating a process for incorporating all seller disclosures obligations for freehold land within one statute applying to land;
- B. simplifying the form of disclosure information given to a buyer through the use of a seller statement and body corporate certificate;
- C. requiring all disclosure to occur at an early point in the transaction so a buyer's decision to purchase can be appropriately informed; and
- D. limiting disclosure obligations to information that is readily accessible at reasonable cost and of value to a buyer at the time of making a decision to purchase a property.

Summary of Recommendations

Recommendation 1: A statutory seller disclosure regime should be enacted in Queensland.

Recommendation 2: The legal framework for seller disclosure should be based upon the following four Guiding Principles:

1. information to be provided by the seller to the buyer pre-contract should be within the seller's knowledge or readily available by search at reasonable cost to the seller;
2. information should be of value to a buyer in making a decision to purchase. Primarily this will be information impacting on title to the property or ongoing financial liability of ownership;
3. the information should be in an accessible form, easily understood and capable of being relied upon by the buyer; and
4. a single legal framework should be established providing consistency in the content and timing of disclosure and remedies available for a failure to comply.

Recommendation 3: Seller disclosure should be required for all sales of freehold land, including sales by auction, mortgagee or receiver sales and options for the sale or purchase of land.

Recommendation 4: The proposed seller disclosure regime for sales of land in Queensland, should not apply to:

- a sale of land between related parties – family members, related companies or parties to a partnership;
- a sale of land between two or more co-owners;
- a sale between owners of adjoining land for the purpose of a boundary realignment;
- a court ordered sale of land;
- a sale by the Sheriff or a local government to enforce a judgment;
- a sale where the buyer is the State or a statutory body;
- a sale where the buyer is a publicly listed company;
- a transfer giving effect to a will (transfer to a personal representative or beneficiary);
- a sale of a proposed lot under the *Land Sales Act 1984* or *Body Corporate and Community Management Act 1997*; or
- a sale of land where the purchase price is greater than \$5 million (exclusive of GST) and the buyer has given the seller a written notice signed by the buyer, stating that the buyer waives the seller's disclosure obligation.

Recommendation 5: A separate seller disclosure regime should be maintained for proposed lots under the *Land Sales Act 1984*, the *Body Corporate and Community Management Act 1997* and the *Building Units and Group Titles Act 1980* as part of the initial implementation of a statutory seller disclosure regime.

A seller of a proposed lot under the *Body Corporate and Community Management Act 1997* should be required to attach a copy of any Building Management Statement that will be registered over lots in the scheme.

Later stages of the implementation may include a review of this recommendation and consideration of the feasibility of integrating the seller disclosure obligations for existing lots and proposed lot within the same Act.

Recommendation 6: The disclosure information must be provided to the buyer before the buyer enters into the contract of sale.

Recommendation 7: An approved form of seller disclosure statement containing prescribed information and prescribed statements should be adopted. Prescribed certificates are not part of the approved form and must be given to the buyer at the same time as the statement but are not required to be attached to the statement.

Recommendation 8: An approved form of body corporate certificate containing prescribed information should replace the disclosure statement and body corporate information certificate currently required by section 205 and 206 of the *Body Corporate and Community Management Act 1997*.

The body corporate should be required to provide an interested person with a body corporate certificate within five business days after receiving a written request accompanied by the prescribed fee.

Recommendation 9: The contents of a seller disclosure statement should be consistent with Guiding Principles 1 and 2. The information should be of value to a buyer as part of the decision to purchase and be information within the knowledge of the seller or readily available at a reasonable cost.

Recommendation 10: A seller should be required to disclose:

- a. a current title search and details of any unregistered or statutory encumbrances;
- b. a copy of the registered plan for the lot and exclusive use plan (if applicable);
- c. the current zoning for the land;
- d. whether the land is on the contaminated land register or environmental management register (s 408 *Environmental Protection Act 1994*);
- e. if a tree order or application exists for the land (s 83 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*);
- f. a pool certificate or notice of no pool certificate under the *Building Act 1975*;
- g. if a Building Energy Efficiency Certificate is registered under the *Building Energy Efficiency Disclosure Act 2010*;
- h. notice of any building work by an unlicensed builder;
- i. a copy of the last rates notice and water notice;
- j. details of any notices, orders or transport infrastructure proposals for the land issued by the state or local government; and
- k. if the property is an existing lot in a community titles scheme under the *Body Corporate and Community Management Act 1997* or an existing lot under the *Building Units and Group Titles Act 1980*, a body corporate certificate.

Recommendation 11: A body corporate certificate, in the approved form, should be given to a buyer of an existing lot in a community titles scheme under the *Body Corporate and Community Management Act 1997* or an existing lot in a body corporate under *Building Units and Group Titles Act 1980* before the buyer enters into a contract to buy the lot. The body corporate certificate may be attached to the seller statement or given separately.

Recommendation 12: A body corporate certificate should contain both lot specific information and prescribed information to inform the buyer about responsibility of living in a community titles scheme.

Lot specific information may relate to:

- the details of the lot;
- contact details of the body corporate secretary;
- current levies and other amounts payable by the lot owner;
- the contribution and interest schedule lot entitlements;
- outstanding amounts payable by the lot owner;
- the sinking fund balance as compared to the sinking fund forecast; and
- the current insurance for the body corporate.

Prescribed information may relate to:

- the obligation of lot owners to pay levies;
- how levies are calculated;
- body corporate duties to regulate and maintain common property;
- rights of lot owners in relation to common property and exclusive use rights;
- the ability of the body corporate to regulate behavior and other activities through by-laws.

Recommendation 13: The seller statement should contain a clear warning to potential buyers that particular information which may be relevant to the value of the property is not included with the seller statement.

The warning should read:

This statement does not include information about:

- *Flooding history*
- *Structural soundness of the building or pest infestation*
- *Current or historical use of the property*
- *Current or past building approvals for the property*
- *Limits imposed by planning laws on the use of the land*
- *Services that are or may be connected to the property*

You are encouraged to make your own inquiries about these matters prior to signing a contract.

You may not be able to terminate the contract if these matters are discovered after you sign.

Recommendation 14: The seller disclosure legislation should authorise a seller statement to be:

- a. given to the buyer in paper or electronic form (via an electronic communication); or
- b. made available to the buyer by:
 - (i) providing a link to a website or other shared location; or
 - (ii) for a sale by auction, by being put on conspicuous display on the day the auction is held.

Recommendation 15: The seller statement should be accurate at time it is given or made available to the buyer. No obligation should be imposed on the seller to update the information after it is given.

Recommendation 16: In the case of a dispute, the onus of proving that the seller complied with the statutory disclosure obligation should rest with the seller.

Recommendation 17: Failure by the seller or agent to make the seller statement available to the buyer prior to entering into a contract of sale is an offence.

Recommendation 18: If the seller:

- fails to provide the seller statement (or body corporate certificate, where required) to the buyer prior to the buyer entering into the contract of sale of the property; or
- provides a seller statement (or body corporate certificate, where required) that is inaccurate,

the buyer is entitled to avoid the contract at any time prior to settlement only if:

- the failure to disclose to the buyer or the defect in the seller statement or body corporate certificate relate to the existence of a material matter affecting the land;
- the buyer was unaware of the existence of the matter when the contract was entered into; and
- the buyer would not have entered into the contract had she or he been aware of the matter.

Recommendation 19: Where another Act provides a remedy for a failure to disclose information on the sale or transfer of land, the remedy under that Act will take precedence over the remedy under the statutory seller disclosure regime.

1. Background

1.1. Review of Queensland Property Laws

On 12 February 2014 the Queensland Government released the *Property Law Review Issues Paper 1: Seller Disclosure in Queensland*¹ (**Issues Paper**) for public consultation. The paper was prepared by the Commercial and Property Law Research Centre (**Centre**) at the Queensland University of Technology (**QUT**). The Issues Paper was the first paper released as part of the broader review of Queensland property laws. Other papers were subsequently released dealing with body corporate issues as well as options for modernising, simplifying and clarifying the *Property Law Act 1974* (Qld) (**PLA**).

The Issues Paper investigated whether there was scope for the current uncoordinated seller disclosure regime in Queensland to be simplified and streamlined so as to improve the sale process for both seller and buyer.

After considering the responses to the Issues Paper, the Centre prepared and published an Interim Report² in July 2016, setting out a number of options for the implementation of a statutory seller disclosure regime.

This Final Report incorporates feedback from both the Issues Paper and Interim Report.

1.2. Submissions to the Issues Paper

The Issues Paper considered:

- whether the disclosure obligations of the seller are clear and consistent;
- how transparent and effective the current form of disclosure is;
- whether the information currently provided to a buyer is of value to the decision of a buyer to purchase and the extent to which any superfluous information disclosure can be reduced; and
- the extent to which the current regime balances the information cost between buyer and seller (including any duplication of searches undertaken).

The Queensland Government received submissions³ from a number of industry groups including:

¹ Commercial and Property Law Research Centre, *Property Law Review Issues Paper 1: Seller Disclosure in Queensland*, released by the Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0009/224874/property-law-review-ip1-seller-disclosure.pdf.

² Commercial and Property Law Research Centre, *Interim Report: Seller Disclosure in Queensland*, released by the Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0011/474896/interim-report-seller-disclosure-in-queensland.pdf.

³ For a full list of submissions, see **Appendix C**.

- Queensland Law Society (**QLS**);
- Property Council of Australia (**PCA**);
- Real Estate Institute Queensland (**REIQ**); and
- Urban Development Institute of Australia (Queensland) (**UDIA**).

The submissions acknowledged the difficulties associated with the current seller disclosure framework in Queensland as identified in the Issues Paper. The REIQ noted that the existing mix of obligations creates ‘inconsistency, confusion and greater potential for disputes.’ The QLS submitted that various disclosure obligations have been added over the years in an ad hoc manner with little regard for the increased complexity of the obligations imposed on sellers or the effectiveness of the disclosures in ‘educating and informing prospective purchasers.’ The PCA supported a statutory seller disclosure regime to alleviate many of the issues with the current regime which were raised in the Issues Paper.

Generally the submissions were supportive of a more streamlined, coordinated and transparent approach to seller disclosure in Queensland, provided there was an appropriate balance between the interest of the buyer in receiving relevant information and the cost burden to a seller of providing the information.

1.3. The Interim Report

The Interim Report was released in July 2016 and taking into account the support for a statutory seller disclosure regime proposed a set of guiding principles for a statutory disclosure regime and several options for implementation.

A further 11 submissions were received from:

- the QLS;
- the REIQ;
- Strata Community Australia (Queensland) (**SCA**);
- The Office of the Commissioner for Body Corporate and Community Management;
- Tim O’Dwyer – Mitchells Solicitors;
- two building inspection companies; and
- several private individuals.⁴

The submissions agreed in principle with the proposed guiding principles but there were different views expressed by stakeholders in relation to the:

- content of the seller disclosure;
- form in which the disclosure should be given; and
- timing of the disclosure.

⁴ For a full list of submissions, see **Appendix C**.

1.4. Final Report

The recommendations in the Final Report take into account submissions received in response to the Issues Paper and the Interim Report as well as further stakeholder feedback received through direct consultation with industry groups including the QLS, the REIQ, the SCA and the Local Government Association of Queensland (**LGAQ**). In light of the submissions and the subsequent consultation, the Centre now makes the recommendations in this Final Report.

2. Is there a need for a statutory seller disclosure regime?

The threshold question considered as part of this Review is whether there is a need for a statutory seller disclosure regime in Queensland.

The submissions to the Issues Paper and Interim Report acknowledge that a single statutory seller disclosure regime will benefit parties to the conveyancing process by:

- clearly identifying seller disclosure obligations;
- creating a coordinated and transparent regime;
- establishing a certain and static (subject, of course, to properly considered changes) regime;
- promoting consistency and clarity of obligations; and
- simplifying the current matrix of obligations.⁵

Although there are a number of clear benefits, stakeholder submissions also highlighted a number of potential risks or disadvantages:

- a statutory disclosure regime should not result in an unfair shifting of the cost burden to sellers. The information to be disclosed should be within the seller's knowledge or available by search at a reasonable cost;
- information provided to a buyer should be relevant to the decision to purchase and presented in a form easily understood by most buyers. It is acknowledged that there is a limit to the information a buyer will read and take into account when buying a property. Whether a buyer understands the significance of the information also depends on the form in which the information is presented.

The Centre recommends the introduction of a statutory seller disclosure regime.

The legislative regime should aim to give effect to the reform objectives of:

- clarifying the disclosure obligations of a seller;
- requiring a transparent and effective form of disclosure;
- providing information of value to the decision of a buyer to purchase; and
- balancing the information cost between buyer and seller.

To assist in meeting these reform objectives the Centre recommends that several Guiding Principles be used in the development of the seller disclosure regime.

⁵ An additional benefit is the opportunity to align with other States where statutory seller disclosure regimes have been in place for a number of years. See New South Wales, Victoria, South Australia, Australian Capital Territory and the proposed regime in Tasmania (although note that part 10 of the *Property Agents and Land Transactions Act 2005* (Tas) has never commenced and is unlikely to do so).

Guiding Principle 1

The information to be provided by the seller to the buyer pre-contract should be within the seller's knowledge or readily available by search at reasonable cost to the seller.

Guiding Principle 1 implicitly acknowledges a 'reasonableness' component to the type of information that is within the seller's knowledge by recognising that some of the information may need to be sourced through readily available and often free or reasonably costed searches. Clearly, the timing of the required disclosure impacts on the balance in terms of costs incurred by the seller and the possible duplication of these costs by a buyer later in the contract process.

While it is recognised that it is difficult to quantify the relevant cost burdens or ultimate economic incidence⁶ in the absence of an economic analysis of the costs associated with disclosure, it is also clear that both a seller (complying with disclosure obligations) and a buyer (undertaking due diligence) will incur costs during the pre-contract process. The purpose underpinning Guiding Principle 1 is to ensure that the best balance possible is achieved in any disclosure regime proposed.

Guiding Principle 2

Information should be of value to a buyer in making a decision to purchase. Primarily this will be information impacting on title to the property or ongoing financial liability of ownership.

A key element of an effective disclosure regime is ensuring that only the information necessary for the buyer to make a decision to purchase should be mandated. The rationale for Guiding Principle 2 is that a buyer is more likely to read and take into account information if it is provided at the right time in the decision making process and is relevant to the decision to buy. The recommendations about timing of the disclosure and the content of the disclosure are based on this Guiding Principle. Limiting the information to matters relevant to the decision to purchase a property also supports Guiding Principle 1 by limiting the cost burden to the seller and providing an appropriate justification for any additional cost to the seller.

Guiding Principle 3

The information should be in an accessible form, easily understood and capable of being relied upon by the buyer

A buyer is more likely to read and take into account information presented in an accessible and easily understood form. Consumer behaviour research suggests that merely providing more information to consumers does not mean the consumer will read it or take it into account. Consumers do not always act rationally and approaching consumer protection through the provision of large amounts of information, in the absence of considering its form, content and comprehensibility, is not an effective approach.⁷

⁶ That is, whether it is the seller or buyer that bears the greatest economic burden (as opposed to the legal burden) of those costs.

⁷ Sharon Christensen et al, 'Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap Between Existing Laws and Calls for Future Reforms' (2009) 9 *Queensland University of Technology Law Journal* 251, 260-261 and 272.

The recommendations about the form of seller disclosure and the content of the disclosure are based upon Guiding Principle 3.

Guiding Principle 4

A single legal framework should be established providing consistency in the content and timing of disclosure and remedies available for a failure to comply.

The current seller disclosure regime in Queensland is multi-layered with obligations imposed through common law, statute, local laws and the standard contract. This disparate approach imposes a significant regulatory burden on a seller (and advisors) in identifying the obligations which may or may not apply to the particular conveyance transaction. This contributes to an increased risk of errors and omissions in completing a transaction. Ultimately this impacts on both buyer and seller and the cost of the transaction.

Ideally a single legislative framework should be adopted with all seller disclosure obligations within one statute. The complexity of the current statutory and contractual regime means that this objective will be difficult to achieve immediately. The Centre recommends a single Act containing all seller disclosure obligations is the ultimate goal which should be approached in stages, with appropriate review of the process at each stage.

Recommendation 1: A statutory seller disclosure regime should be enacted in Queensland.

Recommendation 2: The legal framework for seller disclosure should be based upon the following four Guiding Principles:

- 1. information to be provided by the seller to the buyer pre-contract should be within the seller's knowledge or readily available by search at reasonable cost to the seller;**
- 2. information should be of value to a buyer in making a decision to purchase. Primarily this will be information impacting on title to the property or ongoing financial liability of ownership;**
- 3. the information should be in an accessible form, easily understood and capable of being relied upon by the buyer; and**
- 4. a single legal framework should be established providing consistency in the content and timing of disclosure and remedies available for a failure to comply.**

3. Seller disclosure – Relevant Transactions

This part considers the application of the seller disclosure regime to different types of transactions and land tenures.

In the Interim Report we questioned whether a seller disclosure obligation should apply to all sellers of freehold land and, if so, whether there was a rationale for any exclusions.

The statutory disclosure regimes in New South Wales, South Australia and Victoria apply to land⁸ and in the case of South Australia,⁹ also the sale of small businesses. These terms are defined broadly in these jurisdictions and encompass a wide variety of property, interests and estates in land including community titles lots. The disclosure regime in the Australian Capital Territory is limited to residential property.¹⁰

In Queensland, current disclosure obligations may depend on the type of tenure (freehold, leasehold or unregistered land) or the nature of the use of the land (residential or commercial). For example, the requirement to disclose the existence of a smoke alarm applies to residential property only,¹¹ while the obligations under the *Environmental Protection Act 1994* (Qld) may apply to ‘land’, ‘a place’ or a ‘business’ depending on the particular provision.

To achieve a comprehensive and simplified regime, the Centre recommends that seller disclosure apply to all sales of freehold land with a number of stated exclusions.¹²

3.1. Sale of freehold land

A seller of freehold land should be required to disclose certain information to a buyer. No distinction should be made between residential and commercial property, but the obligation should be limited to a ‘sale’ of land¹³ and not extended to other types of transactions such as exchanges or transfers for no consideration.

Our rationale for this approach is based upon the following:

- a. a disclosure regime that applies to the sale of all freehold land, with some clearly identified excluded categories, has the benefit of: (i) simplifying the existing regime in Queensland; (ii) providing clarity in the application of the regime; and (iii) ensuring the benefit of seller disclosure to a broad range of buyers. Freehold land can be easily defined in legislation and identified by sellers and their legal advisers reducing the risk of failing to comply and the need for costly legal advice;

⁸ *Conveyancing Act 1919* (NSW) ss 7 and 52A(1); *Sale of Land Act 1962* (Vic) ss 2 and 32.

⁹ *Land and Business (Sale and Conveyancing) Act 1994* (SA) ss 3 and 7.

¹⁰ *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 6(1), 9(1) and 10.

¹¹ *Fire and Emergency Services Act 1990* (Qld) s 104RK.

¹² Application of the statutory seller disclosure obligation to the sale of all freehold land received support from REIQ and QLS.

¹³ Land may be defined as land registered under the *Land Title Act 1994* (Qld).

- b. certain information is common to a buyer's decision to purchase irrespective of the type of property (residential or commercial);
- c. limiting disclosure to a 'sale' recognises the limited value of seller disclosure in the context of exchanges, gifts, transmissions by death or other related party transactions; and
- d. extending disclosure obligations to the parties in a transaction concerning the transfer of a State leasehold interest, while potentially beneficial, is subject to other considerations and is already regulated by the *Land Act 1994* (Qld).

3.1.1. Sales by auction

The Centre is of the view that the statutory disclosure regime should apply to a sale by auction.

No rationale was submitted for excluding sales by auction from a statutory seller disclosure regime. In the Centre's view there are several reasons for including sales by auction.

- From a buyer's perspective obtaining information about the property prior to auction should contribute to better decision making by the buyer at the auction. If a property is sold at auction, the contract is entered into, and unconditional, from the time the successful bid is accepted. In the case of residential property there will be no cooling off period under the *Property Occupations Act 2014* (Qld).
- From the seller's perspective there is very little difference between preparation for sale of a property by private treaty or by auction. Similar inquiries and information is required resulting in no cost differential to the seller.
- As the number of auctions increase there is a case for rebalancing the cost of information between buyer and seller. A seller must only do one set of searches and produce a single seller statement. A buyer, in contrast may have to conduct searches for multiple properties with no guarantee the buyer will be the winning bidder on their preferred property.
- There are no practical difficulties raised by requiring disclosure prior to entry into a contract. A sale by auction is formed upon the fall of the hammer. A seller will be able to provide a disclosure statement either prior to the auction or by making the statement available to all potential buyers on the day of auction.¹⁴

3.1.2. Options to purchase

Similar to the approach adopted in other legislation, a sale of land should include entry into an option for the sale or purchase of land.¹⁵ A seller should be required to comply with their disclosure obligations prior to the buyer signing the option or in the case of a nominee exercising the option, prior to the exercise by the nominee. If the seller/grantor provides disclosure at the time of entry into the option then no further disclosure should be required when the option is exercised unless the

¹⁴ The methods for giving or making a seller statement available prior to contract are discussed at 7.1.

¹⁵ *Land Sales Act 1984* (Qld) s 9; *Body Corporate and Community Management Act 1997* (Qld) s 212B; *Property Occupations Act 2014* (Qld) s 160.

option is exercised by a third party (nominee). This approach provides consistency with the legislative approach to disclosure obligations for proposed lots.¹⁶

3.1.3. Sale by a mortgagee or receiver

Submissions to the Issues Paper and the Interim Report questioned whether a mortgagee exercising a power of sale should be excluded. The argument in favour of excluding mortgagee sales is that a mortgagee will have no personal knowledge of the property and should not be expected to undertake investigation prior to sale. In the Centre's view the arguments in favour of inclusion are stronger. First, a mortgagee exercising a power of sale is under a duty to take reasonable care to ensure the property is sold at market value.¹⁷ As part of discharging this duty a mortgagee should undertake relevant due diligence, including ascertaining any defects in the property and in the case of residential property, a valuation, which is likely to bring to light relevant financial, title and other defects impacting on value. Secondly, the information recommended for disclosure is readily available at a reasonable cost and is information a mortgagee should already seek to obtain to fulfil their duty of care. Thirdly, no cogent reason was advanced as to why a buyer from a mortgagee exercising a power of sale should be at a disadvantage compared to other buyers.

Recommendation 3: Seller disclosure should be required for all sales of freehold land, including sales by auction, mortgagee or receiver sales and options for the sale or purchase of land.

3.2. Excluded Transactions

The views of stakeholders varied in relation to potential exclusion from the disclosure regime, but there was broad agreement that exclusions were required. The QLS suggested that the statutory seller disclosure regime should mirror the exclusions in section 160 of the *Property Occupations Act 2014* (Qld) which excludes sales by auction, sales to government bodies and sales to other sophisticated parties. The Centre agrees that certain exclusions are necessary, but recommends a different group of exclusions to the *Property Occupations Act 2014* (Qld).

The recommended exclusions fall into three categories: types of transactions; types of sellers or buyers; and certain categories of land. The exclusions are justified either because:

- there is no cost benefit in requiring disclosure because the information will be of little value to the buyer; or
- the buyer is a sophisticated party capable of ascertaining the value of the property and any defects through their own means.

¹⁶ See *Land Sales Act 1984* (Qld) s 9; *Body Corporate and Community Management Act 1997* (Qld) s 212B. Rights of pre-emption are not intended to fall within the scope of the seller disclosure regime.

¹⁷ *Property Law Act 1974* (Qld) s 85(1). In certain prescribed cases, this duty extends to obtaining reliable evidence of the property value and maintaining the property including undertaking repairs and maintenance: s 85(1A).

In forming a view about the recommended exclusions the Centre has taken into account the exclusions contained in statutory seller disclosure regimes in other States.¹⁸

3.2.1. Related parties

A related party exclusion is recommended on the basis that the cost of a seller providing disclosure is not justified by a sufficient reciprocal benefit to the buyer. A related party transaction is not an arm's length transaction, will usually involve a transfer of property for a personal or taxation reason and in many cases is a voluntary transaction (i.e. no consideration) or under market value. Often the related entity is aware of the condition of the property and any issues related to value.

A related party transaction should include a transaction between:

- a. family members: defined broadly to include spouse, defacto, siblings, children, direct descendants, and associates of these parties (ie child of a spouse);
- b. related corporate entities: defined to include parent and subsidiary, and companies owned or controlled by an entity; and
- c. members of a partnership.

There is also a case for defining a related party transaction to include a sale to a lessee of property pursuant to an option in the lease. This may be either a related party transaction or a specific exemption.

3.2.2. Co-owners

Similarly there is no discernible benefit in requiring a co-owner to give disclosure to another co-owner even if the transaction is for market value. As with related parties, a sale between co-owners is not a sale to a third party unfamiliar with the property.

3.2.3. Boundary realignment

A sale or transfer of land between owners of adjoining land for the purpose of a boundary realignment should also be excluded from the seller disclosure regime. In this case, the buyer as the adjoining landowner is likely to be aware of any issues relating to the property and in any event is only acquiring a portion of the land to amalgamate with their own title.

¹⁸ See New South Wales: *Conveyancing Act 1919* (NSW) s 52A(2) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) s 10 and Schedule 4; Australian Capital Territory: *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(2); South Australia and Victoria do not have exclusion categories, although section 32 of the *Land and Business (Sale and Conveyancing) Act 1994* (SA) provides the Minister with discretion, upon application by a person, to exempt a person from a specified provision of the Act. Any grant of an exemption must be notified in the Gazette.

3.2.4. Buyer is the state or a statutory body

The State government or a statutory body may acquire land either through a market transaction or acquisition. If the land is being acquired for a public purpose there is no consumer protection rationale that would require the owner to provide disclosure to the State. In any event this transaction is not a 'sale' according to the usual definition. In the case of a market transaction the State is able to protect its own interests and undertake due diligence inquiries prior to contract if necessary.

3.2.5. Buyer is a publically listed company

Similarly, a public company is a sophisticated party usually with legal and business advisers capable of undertaking inquiries to establish the value of a property and protect their interests. The minimal benefit derived by a public company from seller disclosure is outweighed by the cost burden to a seller, who is likely to be at a bargaining disadvantage in many cases.

3.2.6. Court ordered sale

A court may order a sale of a property in a number of circumstances:

- a. where parties to a contract are in dispute about performance of the contract and the court orders one party to perform the contract and transfer ownership;
- b. where parties are in dispute about ownership of a property and the court orders one party to transfer ownership to the other either with or without consideration (e.g. a Family Court order or an order following a dispute between beneficiaries to a will). In this case there is usually no contract; or
- c. where parties are in dispute about ownership and the court orders the sale of the property by a statutory trustee.

In the first two situations no disclosure should be required either because disclosure has been given or because there is no benefit to the buyer. In the third situation no disclosure is required to give effect to the court order, but the statutory trustee should be required to give disclosure to any potential buyers.

3.2.7. Sale by Sheriff or Local government

There are policy reasons for excluding sales by the Sheriff pursuant to enforcement of a judgment and sale by a local government for non-payment of rates. While disclosure may provide some benefit to a buyer, imposing a disclosure obligation on the Sheriff or local government adds to the cost of the transaction.

3.2.8. Deceased estate transactions

By restricting the seller disclosure obligation to a proper 'sale' transaction a transfer of a property following death to a personal representative or a beneficiary under a will should be excluded. For the sake of clarity the Centre recommends that these transactions should be specifically excluded.

A sale of land by the personal representative of a deceased estate to a third party is no different to a sale by any other owner of land. The personal representative is under a duty to act in the best interests of the estate and will usually be required to obtain information about the property in order to effect a sale.

3.2.9. Purchase price greater than \$5 Million (exclusive of GST)

The QLS submitted that sales of land for a price in excess of \$5 million should be excluded. The rationale was that:

- a. most residential transactions would fall below this threshold;
- b. buyers of both residential and commercial property over the value of \$5 million will usually engage legal and other advisors prior to entering into a contract; and
- c. parties to commercial transactions should be free to negotiate terms without the constraint of mandatory disclosure, particularly as most commercial transactions are subject to buyer due diligence.

The Centre agrees there is merit, for the reasons given, in excluding these types of transaction from a mandatory disclosure regime, but only if the buyer agrees to waive disclosure prior to entry into the contract.

Generally, parties to a sale of land should be prohibited from contracting out of the seller disclosure regime. This provides certainty for all parties and is consistent with the approach taken in other Australian jurisdictions.¹⁹ However, where the purchase price is for an amount greater than \$5 million (exclusive of GST), the Centre recommends that the buyer should have the option of waiving the requirement for a seller disclosure statement by giving written notice to the seller of the waiver. This means the exclusion will not apply automatically to all sales over \$5 million which is consistent with the approach under other Queensland legislation where a disclosure requirement may be waived.²⁰ The main reason for this approach is to ensure that buyers of residential or commercial units over \$5 million are entitled to a seller statement including a body corporate certificate from the seller unless the requirement is specifically waived.

¹⁹ See for example, *Sale of Land Act 1962* (Vic) s 32N.

²⁰ See for example, *Property Occupations Act 2014* (Qld) s 167 which allows a buyer under a relevant contract to waive the cooling off period by giving written notice to the seller of the waiver. See for example the 'waiver notice' in the *Retail Shop Leases Act 1994* (Qld) s 21B(4) and s 21E(5).

Recommendation 4: The proposed seller disclosure regime for sales of land in Queensland, should not apply to:

- a sale of land between related parties – family members, related companies or parties to a partnership;
- a sale of land between two or more co-owners;
- a sale between owners of adjoining land for the purpose of a boundary realignment;
- a court ordered sale of land;
- a sale by the Sheriff or a local government to enforce a judgment;
- a sale where the buyer is the State or a statutory body;
- a sale where the buyer is a publicly listed company;
- a transfer giving effect to a will (transfer to a personal representative or beneficiary);
- a sale of a proposed lot under the *Land Sales Act 1984* or *Body Corporate and Community Management Act 1997*; or
- a sale of land where the purchase price is greater than \$5 million (exclusive of GST) and the buyer has given the seller a written notice signed by the buyer, stating that the buyer waives the seller’s disclosure obligation.

3.2.10. Proposed lots

Extensive disclosure obligations currently apply to the seller of a proposed lot under the *Land Sales Act 1984* (Qld)²¹ and proposed lots in a community title scheme under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**)²² or *Building Units and Group Titles Act 1980* (Qld).²³ Generally these provisions apply where a sale contract is entered into prior to registration of the lot under the *Land Title Act 1994* (Qld). It is also common that at the time of contract a buyer will be unable to inspect the lot as it will not physically exist. This presents different policy considerations particularly in relation to the information a seller should be required to disclose. For this reason, a separate disclosure regime for proposed lots should be maintained with specific rules aimed at addressing the unique nature of a proposed lot.

The disclosure obligations for proposed lots under the *Land Sales Act 1984* (Qld), the BCCM Act and the *Building Units and Group Titles Act 1980* (Qld) were reviewed by the Queensland Government in 2011-2013. Amendments were introduced and passed in 2014 to improve the interaction of the three Acts and to simplify and improve the disclosure process. Stakeholders generally consider the disclosure regime for proposed lots to be satisfactory, but in one case submitted that an additional matter, a copy of the Building Management Statement (**BMS**), should be attached to the disclosure statement under the BCCM Act. A BMS will contain additional rights and obligations in the nature of easements over shared areas and usually specify a cost sharing regime. A BMS is in the nature of an encumbrance over all lots within a community titles scheme once it is registered. Until it is registered there is a potential argument that a seller is not required to disclose a BMS under the general law²⁴

²¹ *Land Sales Act 1984* (Qld) ss 9- s 21.

²² *Body Corporate and Community Management Act 1997* (Qld) s 212B – s 217.

²³ *Building Units and Group Titles Act 1980* (Qld) s 48G- s49H.

²⁴ *Dormer v Solo Investments Pty Ltd* [1974] 1 NSWLR 428 (a potential encumbrance is not a defect in title that is required to be disclosed under the general law).

and it is not listed in the matters for disclosure under the BCCM Act²⁵. There is a need for certainty about the obligation of a seller to disclose the BMS to potential buyers. The Centre agrees with this suggested inclusion, but otherwise that no change is currently required to the disclosure regime for proposed lots.

Recommendation 5: A separate seller disclosure regime should be maintained for proposed lots under the *Land Sales Act 1984*, the *Body Corporate and Community Management Act 1997* and the *Building Units and Group Titles Act 1980* as part of the initial implementation of a statutory seller disclosure regime.

A seller of a proposed lot under the *Body Corporate and Community Management Act 1997* should be required to attach a copy of any Building Management Statement that will be registered over lots in the scheme.

Later stages of the implementation may include a review of this recommendation and consideration of the feasibility of integrating the seller disclosure obligations for existing lots and proposed lot within the same Act.

²⁵ *Body Corporate and Community Management Act 1997* (Qld) s 213.

4. Timing of disclosure

4.1. Impact of timing on value of information to buyer

The timing of seller disclosure has a significant impact on both the nature of the information required to be given to the buyer and the value of that information to the buyer's decision to purchase.²⁶ Studies support the proposition that early disclosure of information has a greater impact on a buyer's decision making than disclosure after contracts have been signed.²⁷ In the context of consumer credit, recent empirical research indicates that 'consumers have more confidence, find comparison of products easier and make more informed choices ... when exposed earlier to consumer credit disclosure.'²⁸ The benefits of earlier disclosure include allowing a buyer more time to consider relevant information to determine whether or not an offer will be made and also how much to offer. Buyers also have the opportunity to make further inquiries (which may require the engagement of a lawyer) if they consider this necessary prior to making an offer.²⁹ On this basis an argument can be made for a disclosure statement to be available for buyers at the time the property is listed for sale.³⁰

Although there are advantages for buyers in early disclosure, sellers may be disadvantaged if compliance with the disclosure requirements causes a delay in listing the property for sale or executing a contract. There may also be risks for a seller arising from inaccurate information if a disclosure statement is prepared at the time of listing, but the property is not sold for several months, during which time the information may change and require further expenditure to update. Varying degrees of support were expressed for imposing an obligation on a seller to prepare disclosure information prior to listing a property for sale. Concerns were raised about the practicality of this approach in Queensland and whether this would delay a seller in the sale process.

In the Centre's view a balance is therefore required between providing relevant information to a buyer at a point in the sale process where it will inform a buyer's decision to purchase and the difficulties for a seller in accessing and collating this information. This also highlights the interconnected nature and need for a reasonable balance between the timing, content and form of disclosure.

²⁶ Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962* (2012), 4.

²⁷ See Sharon Christensen et al, 'Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap between Existing Laws and Calls for Future Reforms' (2009) 9 *Queensland University of Technology Law Journal* 251, 276-278 and Christensen et al, 'Evaluating Information Disclosure to Buyers of Real Estate – Useful or Merely Adding to the Confusion and Expense?' (2007) 7 *Queensland University of Technology Law Journal* 148, 169-171.

²⁸ Paul O'Shea, *Simplification of Disclosure Regulation for the Consumer Credit Code: Empirical Research and Design Redesign – Final Report* (2010) 241. Early disclosure in the case of a home loan in this study occurred at the approval letter stage and in the case of credit cards, at the solicitation letter or pre-approval letter stage.

²⁹ Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962* (2012), 4.

³⁰ In the ACT a seller is required to have a disclosure statement available for a buyer at the time the property is listed for sale: *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 10.

4.2. Pre-contract disclosure

Currently in Queensland, contracts are often signed by buyers before any searches or due diligence inquiries are undertaken by the buyer. Except in the case of a sale of a lot in a community titles scheme, a seller does not provide the buyer with information about the property until the buyer is given a copy of the proposed contract of sale.

In the Centre's view a seller should be required to provide the disclosure information to a buyer prior to the buyer entering into a contract. Provided the information is relevant to the buyer's decision to purchase and presented in an accessible form, the Centre is of the view that prescribing an earlier time for disclosure or a particular period prior to signing a contract does not provide any greater benefits to a buyer and increases the risk of non-compliance for a seller.

Obliging a seller to give the disclosure information 'before the buyer enters into a contract of sale' also has the benefit of aligning with the existing requirements for giving a disclosure statement under the *Land Sales Act 1984* (Qld) and the BCCM Act.³¹ In the case of a sale by auction, this means the disclosure information must be given to the buyer prior to the fall of the hammer accepting the winning bid. In practical terms this means the information should be given to the buyer prior to the auction.

A seller may be able to technically comply with a requirement to give the disclosure information 'before the buyer enters into a contract of sale' by providing the information to the buyer immediately prior to the signing of the contract. In such a case, the benefit of the information to a buyer's decision to purchase will be negligible, but the Centre anticipates that once the seller disclosure regime commences and buyers become aware of the obligation to disclose, buyers will request the information at an early stage in the negotiations. Buyer pressure to provide information at an early stage will have beneficial consequences for the sale process by encouraging better informed sellers, more accurate information in contracts and a greater likelihood of sellers complying with disclosure obligations.

Recommendation 6: The disclosure information must be provided to the buyer before the buyer enters into the contract of sale.

³¹ *Land Sales Act 1984* (Qld), s 10 and *Body Corporate and Community Management Act 1997* (Qld) s 206(1). This is also the same approach as adopted in New South Wales and Victoria, *Conveyancing Act 1919* (NSW) s 52A(2)(a); *Sale of Land Act 1962* (Vic) s 32(1).

5. Form of disclosure

5.1. A single disclosure document

Current seller disclosure in Queensland originates from a combination of common law, contract and statutory sources with diverse requirements and formats for disclosure. As a consequence a seller may need to:

- disclose information in the Schedule to the REIQ standard contracts to comply with common law disclosure or defects or to negate contractual or statutory warranties applying to the transaction;
- provide notices, certificates or other documents disclosing matters as required by certain statutes;³²
- give a disclosure statement as required under the BCCM Act for existing community title lots;³³ and
- in the case of proposed lots under the BCCM Act or *Land Sales Act 1984* (Qld) a disclosure plan and other documents required to be disclosed under the BCCM Act (ie management and letting agreements and other service contracts).³⁴

The introduction of a single seller disclosure regime provides an opportunity to consolidate the disparate common law and statutory disclosure obligations into a single document provided to the buyer prior to contract.

The Centre recommends a staged approach to achieving a single coordinated seller disclosure regime³⁵ and in the initial stage recommends a simple seller disclosure statement incorporating the prescribed content in a format that will be easily understood by an average buyer.

5.2. Format of seller statement

While there is an absence of consumer behaviour research specifically considering the best form of disclosure in the context of property sales, there are empirical studies in the context of consumer credit that show disclosure documents which are simple, easy to understand and concise are more likely to be useful for consumers.³⁶ This is consistent with studies undertaken in the United States in the property context which suggest that a disclosure document in the form of a 'simple checklist with space provided below each item for the seller to describe the nature and extent of any disclosed

³² For example notice under *Environmental Protection Act 1994* (Qld) s 408 about land on the Contaminated Land Register or a copy of a tree order issued by QCAT under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).

³³ *Body Corporate and Community Management Act 1997* (Qld) s 206.

³⁴ *Body Corporate and Community Management Act 1997* (Qld) s 213.

³⁵ See Guiding Principle 2 at paragraph 2 above and the discussion at paragraph 9 below.

³⁶ Paul O'Shea, *Simplification of Disclosure Regulation for the Consumer Credit Code: Empirical Research and Design Redesign* – Final Report (2010) 241. The study used a new, simpler form of consumer credit pre-contractual disclosure in a 'Schumer Box' format, which is essentially a simple disclosure document in a tabular format containing relevant amounts or rates identifying the essential financial features of a credit contract (16).

defects' is more likely to be read by a buyer than one which simply attaches a series of searches or certificates.³⁷

The other Australian jurisdictions each adopt different forms of seller disclosure, although there is some commonality. In NSW a buyer is given a number of certificates and other search results in a combined form. In Victoria a form of seller statement is prescribed which the seller completes and attaches a number of required certificates. Victoria recently reviewed their seller disclosure regime but retained the same form of seller disclosure statement. A new requirement to attach a due diligence checklist (which is a prescribed form containing important additional information to buyers) was implemented as a result of the review.³⁸

Taking into account the current literature the Centre recommends the adoption of a seller disclosure statement with the following attributes:

- a. the statement should be in plain English and in a prescribed form;
- b. the Seller Statement and all other documents should be expressly permitted by the Act to be given in paper or electronic format;
- c. the seller statement should include three types of matters:
 - a. 'prescribed information' – which is the information a seller is expected to disclose to a buyer (e.g. current zoning, unregistered encumbrances);
 - b. 'prescribed certificates' – these are government certificates or other required notices (e.g. current title search, registered plan, pool safety certificate, latest rates and water notices, body corporate certificate). Certificates are suggested on the basis this is the clearest and most cost efficient method of disclosing the particular information;
 - c. 'prescribed statements' – these are standard statements that are part of the prescribed form;
- d. the legislation should not mandate the method of providing prescribed certificates except that they must be provided to the buyer at the same time as the seller statement.³⁹ An important reason for this recommendation is to facilitate the giving of a seller statement electronically. If given electronically the certificates may be included as part of the same electronic document or separate documents in the same electronic communication. It is not possible for the certificates to be 'attached' to an electronic seller statement. Therefore, the requirements should be drafted in terms that facilitate electronic formats;

³⁷ Sharon Christensen et al, 'Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap between Existing Laws and Calls for Future Reforms' (2009) 9 *Queensland University of Technology Law Journal* 251, 276-278. See also Australian Government, *Financial System Inquiry Interim Report* (2014), 3.59 which noted that better information presentation could improve disclosure by using shorter disclosure documents, plain English, graphics and breaking down complex information to improve consumer understanding.

³⁸ *Sales of Land Act 1962* (Vic) ss 33, 33A, 33B and 33C inserted by the *Sale of Land Amendments Act 2014* (Vic) in April 2014. The checklist is intended to assist prospective buyers to identify information which they may wish to obtain in respect of the land for sale in addition to the information supplied in the section 32 statement for the land.

³⁹ This is to minimise technical non-compliance claims by the buyer such as occurred under the property *Agents and Motor Dealers Act 2000* (Qld) with requirements to 'attach' a document to the warning statement.

- e. the prescribed form should allow for a seller to disclose matters inconsistent with the 'prescribed statements'.

An example to illustrate a seller statement is included in **Appendix A**.

Prescribed statements are a combination of statements by the seller about matters that may affect the property and information aimed at educating the buyer about the transaction. The purpose of recommending certain prescribed statements is to ensure consistency in the statements made by a seller and the information provided to buyers. Over time the use of consistent statements also contributes to a shared understanding amongst sellers, buyers and real estate agents about the matters being disclosed and when a seller may need to provide additional information to avoid an inaccurate statement.

5.3. Form of Body Corporate Certificate

If the property to be sold is a lot in a community titles scheme, the Centre recommends that certain financial and other body corporate information should be provided to the buyer as part of the seller statement. A body corporate certificate should be included within the list of prescribed certificates for a seller statement if the property is a lot in a community titles scheme or a lot in a body corporate under the *Building Units and Group Titles Act 1980* (Qld).

An example to illustrate a Body Corporate Certificate is included in **Appendix B**.

As is currently the case, the Centre also recommends that the body corporate certificate continue to be available to interested persons.⁴⁰

Similar to the seller statement, a body corporate certificate may include a number of prescribed certificates:

- a copy of the body corporate assets register for the scheme;
- a copy of the register of improvements for the scheme (and a statement that a lot owner may be responsible for maintaining improvements which are for the benefit of the lot but located on common property. These improvements may or may not be within an exclusive use area); and
- details of the current insurance policies held by the body corporate for the building and public liability.

Further, the Centre recommends that the body corporate be required to provide a lot owner with the body corporate certificate within a set time frame for a prescribed fee. The BCCM Act currently provides that a body corporate must, within seven days after receiving a written request accompanied by the prescribed fee, issue the body corporate information certificate.⁴¹ It is recommended that this time be shortened to five business days. Given the modern methods of information storage, this should be sufficient time for the body corporate to retrieve and prepare the relevant information.

⁴⁰ *Body Corporate and Community Management Act 1997* (Qld) s 205(5).

⁴¹ *Body Corporate and Community Management Act 1997* (Qld) s 205(4).

Recommendation 7: An approved form of seller disclosure statement containing prescribed information and prescribed statements should be adopted. Prescribed certificates are not part of the approved form and must be given to the buyer at the same time as the statement but are not required to be attached to the statement.

Recommendation 8: An approved form of body corporate certificate containing prescribed information should replace the disclosure statement and body corporate information certificate currently required by sections 205 and 206 of the *Body Corporate and Community Management Act 1997*.

The body corporate should be required to provide an interested person with a body corporate certificate within five business days after receiving a written request accompanied by the prescribed fee.

6. Content of disclosure

6.1. Consistency with guiding principles

A key aspect of an effective seller disclosure regime is to provide information to the buyer that is of value to their decision to purchase a property. As discussed at 4.1 whether information is valuable to a buyer's decision depends on when in the transaction the information is provided and the nature of the information. Guiding Principle 2⁴² reflects both of these issues:

Information should be of value to a buyer in making a decision to purchase. Primarily this will be information impacting on title to the property or ongoing financial liability of ownership.

To achieve a balance between information of value to a buyer and the cost to the seller of providing that information Guiding Principle 1 acknowledges that:

The information to be provided by the seller to the buyer pre-contract should be within the seller's knowledge or readily available by search at reasonable cost to the seller.

Stakeholders expressed a wide range of views about the content of seller disclosure. The QLS supported the inclusion of information such as title search, survey plan, easements and covenants, planning and rates information, building approvals, drainage plans, pool safety certificates, and flood information (where available). The REIQ supported the simplest form of seller statement where the majority of searches required to complete the statement are free. This would minimise costs for sellers and keep the time required to prepare the statement as short as possible.

The Centre recommends a staged approach to the introduction of a single legislative framework for seller disclosure. While there are consumer benefits and cost savings from a single coordinated framework, there are also benefits from taking a staged approach including the ability to review the effectiveness of the disclosure regime and to allow time for all stakeholders to transition to the new process.

In the first stage the Centre recommends that information concerning defects in title and matters currently required to be disclosed by statute be included in a seller disclosure statement.⁴³ The primary objective of this stage is to combine the existing disclosure obligations within a single document that is given to a buyer prior to contract. Maintaining continuity of obligations in the initial stage will assist in transitioning to a pre-contract seller disclosure regime. The content of the seller disclosure statement is recommended on the basis it is relevant to either title to the land or financial liabilities of ownership (i.e. rates, taxes, statutory charges) as well as current statutory disclosure obligations. The recommended content is information within a landowner's knowledge or readily available by search at a reasonable costs, consistent with Guiding Principle 1.

⁴² Discussed above at paragraph 2.

⁴³ Discussed below at paragraph 6.2.

In the second stage consideration should be given to incorporating the seller statements and warranties contained within the standard REIQ contracts and the BCCM Act.⁴⁴ This stage may also include a strategy for incorporating all statutory disclosure obligations related to land within the one statute, similar to the approach in NSW and Victoria.

A third stage may potentially include a review of the operation of the disclosure regime and the implementation of the strategy developed in the second stage. The review may also consider other information for inclusion within the statutory disclosure regime which is currently not recommended for inclusion.

Recommendation 9: The contents of a seller disclosure statement should be consistent with Guiding Principles 1 and 2. The information should be of value to a buyer as part of the decision to purchase and be information within the knowledge of the seller or readily available at a reasonable cost.

6.2. Included Content

6.2.1. Specific considerations

The Centre's recommendations about the matters to be included in a seller statement are based upon the Guiding Principles and aim to achieve a balance between the following considerations:

- the cost to the seller of obtaining and providing the information compared to the current disclosure obligations;
- whether the matter to be disclosed impacts title to the property or creates a financial burden in contrast to a matter that merely impacts on use and enjoyment;
- the value of the information to a buyer's decision to purchase;
- whether the standard REIQ contract already makes provision for the disclosure of the information;
- whether the information is readily accessible by the seller either from their own knowledge or from an official source; and
- whether the matters to be disclosed are capable of being described with clarity and certainty in legislation.

In relation to each matter recommended for inclusion this Final Report identifies the 'prescribed information', 'prescribed certificate' or 'prescribed statement' to be included.

6.2.2. Identification of the seller and property

Information disclosed by a seller should be clearly related to a particular property. To ensure clarity a seller disclosure statement should:

⁴⁴ *Body Corporate and Community Management Act 1997* (Qld) s 223.

- a. state the name of the seller; and
- b. identify the property by the address and real property description.

6.2.3. Title information

In addition to identifying the property by its real property description the seller should be required to provide a description of the current title and any interests impacting on the seller’s title.

The Centre recommends that a seller provide to the buyer:

Prescribed certificates	<ol style="list-style-type: none"> a. a copy of a current title search which lists current registered interests and administrative advices; and b. a copy of the registered plan for the property and exclusive use plan (if applicable).
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As there are also a number of other unregistered or statutory interests that may affect the seller’s title to the land, a seller should also make the following statement:

Prescribed statement	<p><i>To the seller’s knowledge there are no other unregistered or statutory easements, covenants or encumbrances affecting the property that will not be released at settlement other than those disclosed with this statement.</i></p>
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In the event there are other interests of this nature, which will not be released or paid out at settlement, a seller should be required to disclose sufficient details to enable the buyer to undertake further inquiries. The benefit of this approach is twofold. First these types of encumbrances are not common so in most cases a seller can comply with the disclosure requirement by providing a copy of the current title and registered plan. Secondly, the statement alerts a buyer to the fact there may be other interests not recorded in the Land Registry that may impact the buyer’s title to the land.

‘Sufficient details’ of the encumbrance may vary depending on the encumbrance. In the case of an unregistered interest, such as an easement or short lease, a seller may need to provide a copy of the easement or lease document whereas in the case of a statutory easement, a description of the easement and its location may be sufficient.

Examples of unregistered or statutory encumbrances include:

- easements for drainage or sewerage in favour of the local government;⁴⁵
- land access agreements or conduct and compensation agreements;⁴⁶ or
- notices issued by the local government for work to be done on the property.

⁴⁵ *Local Government Act 2009* (Qld) s 144.

⁴⁶ *Land Title Act 1994* (Qld) s 185(1)(h)-(j); *Mineral and Energy Resources (Common Provision) Act 2014* (Qld) ss 47(2), 83.

Prescribed information	Sufficient details of encumbrances to enable the buyer to undertake further inquiries. If a registered interest a copy of the current title search is sufficient. If unregistered or statutory encumbrances further explanation of the interest and where to obtain information may be needed.
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In the case of a community titles scheme there may also be statutory easements of support and shelter imposed under the *Land Title Act 1994* (Qld). These easements are not registered in the Land Registry and are an essential part of a scheme. The seller statement should provide information only to the buyer:

Prescribed statement	<i>If the property is part of a community title scheme it may be subject to and have the benefit of statutory easements under the Land Title Act 1994, which are not required to be disclosed.</i>
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6.2.4. Zoning

The seller statement should describe the current zoning for the property. This information is relevant to the value of the property and can be obtained by the seller from the local government or Queensland Globe.

Prescribed information	Zoning under the local planning scheme.
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The Centre is not recommending that a seller warrant the use of the land is legal or consistent with the zoning. The seller should clearly state as part of the disclosure that:

Prescribed Statement	<i>No warranty is given that the use of the land is legal. Further information about land use, transport, sewerage and drainage infrastructure, vegetation and flooding may be available from the local government or from the <u>Queensland Globe</u>.</i>
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Consideration was given to requiring a seller to provide a Limited Town Planning Certificate (LTPC) to the buyer. The Centre is of the view that as the same information contained within a LTPC is available for a lesser cost, imposing this obligation is not justified. This position should be reviewed after commencement of the *Planning Act 2016* (Qld). Under this Act a LTPC will include information about outstanding infrastructure charges which attach to the land as an encumbrance.

6.2.5. Existing statutory disclosure

Existing seller statutory disclosure obligations should be included within any seller disclosure statement. This will not require any legislative amendment to existing obligations. The proposed seller disclosure regime will act as umbrella legislation to coordinate the numerous seller disclosure obligations. In later stages of implementation consideration may be given to developing a single statute incorporating existing obligations.

NOT GOVERNMENT POLICY

Each of the current statutory disclosure obligations can be accommodated in a seller statement without significant amendment to the individual statutes. To ensure consistency in disclosure and to ensure the need to make disclosure is brought to the attention of the seller, the Centre recommends the seller statement include the following statements:

Prescribed statements	<p><i>The seller states:</i></p> <ul style="list-style-type: none">• <i>The land is not recorded on the Environmental Management Register or Contaminated Land Register unless a notice under section 408 Environmental Planning Act 1994 is attached.</i>• <i>There are no tree orders or applications under the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 affecting the property other than those attached to this statement.</i>• <i>No building work has been carried out by an unlicensed person in the last six years unless a notice under section 47 Queensland Building and Construction Commission Act 1991 is attached.</i>• <i>No warranties are given about the structural soundness of the buildings or improvements on the property. It is recommended that a buyer engage a licensed building inspector to inspect the building and provide a report.</i>• <i>If the property is a commercial office building of more than 1000m² a Building Energy Efficiency Certificate is available on the Building Energy Efficiency Register.⁴⁷</i>
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In the event any of the prescribed statements require disclosure (and if there is a pool on the property) the following certificates will be required to be given with the seller statement prior to contract:

Prescribed certificates	<ul style="list-style-type: none">• A notice under section 408 of the <i>Environmental Protection Act 1994</i> (Qld) if the land is recorded on the <i>Environmental Management Register</i> or <i>Contaminated Land Register</i>;• Copy of any tree orders or applications under section 83 of the <i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i> (Qld);• A pool certificate or notice of no pool certificate for the property or if a shared pool a copy of the pool certificate under the <i>Building Act 1975</i> (Qld);• A notice under section 47 of the <i>Queensland Building and Construction Commission Act 1991</i> (Qld) (if applicable).
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⁴⁷ A person must not sell a commercial building of greater than 1000 m² unless a Building Energy Efficiency Certificate is registered under the *Building Energy Efficiency Disclosure Act 2010*.

6.2.6. Rates Taxes and Notices

A seller should be required to provide the buyer with a copy of the last rates notice and water notice for the property.

A seller should also disclose any local government notices to undertake work (which at law are defects in title), notices to resume or transport proposals within the seller’s knowledge. To facilitate this disclosure a standard statement should be included in the seller statement indicating there are no orders or notices unless disclosed in the statement.

Prescribed certificates	<p>Current rates notice and water notice.</p> <p>Copies of notices from local government or notice of intention to resume or any other orders issued by government.</p>
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Prescribed statement	<p><i>To the seller’s knowledge there are no orders, notices or transport infrastructure proposals affecting the land issued by a State or local government or other relevant authority that may affect the title to or use of the land after settlement, except as disclosed in this statement.</i></p>
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<p>Recommendation 10: A seller should be required to disclose:</p> <ul style="list-style-type: none"> a. a current title search and details of any unregistered or statutory encumbrances; b. a copy of the registered plan for the lot and exclusive use plan (if applicable); c. the current zoning for the land; d. whether the land is on the contaminated land register or environmental management register (s 408 <i>Environmental Protection Act 1994</i>); e. if a tree order or application exists for the land (s 83 <i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i>); f. a pool certificate or notice of no pool certificate under the <i>Building Act 1975</i>; g. if a Building Energy Efficiency Certificate is registered under the <i>Building Energy Efficiency Disclosure Act 2010</i>; h. notice of any building work by an unlicensed builder; i. a copy of the last rates notice and water notice; j. details of any notices, orders or transport infrastructure proposals for the land issued by the state or local government; and k. if the property is an existing lot in a community titles scheme under <i>Body Corporate and Community Management Act 1997</i> or an existing lot under the <i>Building Units and Group Titles Act 1980</i>, a body corporate certificate.
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6.3. Body corporate certificate

Where the property is a lot in a community titles scheme or a lot in a building units or group titles plan the seller should be required to provide further information about the lot, the body corporate and the financial obligations associated with ownership of the lot.

Under existing legislation, the seller of a lot in a community titles scheme under the BCCM Act is required to provide a disclosure statement containing specified information to a prospective buyer before the buyer enters into a contract to buy the lot.⁴⁸ This disclosure statement is known as a **section 206 disclosure statement**. Additional information relating to the lot may also be obtained (on request) from the body corporate by interested persons (including potential buyers) in the form of a body corporate information certificate, as prescribed by section 205.⁴⁹ The recipient of the section 205 certificate is able to rely on it as conclusive evidence against the body corporate of matters contained in the certificate.⁵⁰ Under the *Building Units and Group Titles Act 1980 (Qld)* (**BUGTA**), a prescribed person⁵¹ may request a certificate⁵² that is similar in content to the section 205 certificate and the 206 disclosure statement (**BUGTA certificate**).

Most of the information contained in a section 205 certificate, a section 206 disclosure statement and a BUGTA certificate relate to the financial liability of a prospective buyer upon becoming the owner of the lot. Much of this information is unique to lots in a body corporate.⁵³

The Centre recommends that for all existing lots in a community titles scheme under the BCCM Act or in a body corporate under the BUGTA a seller should be required to disclose the information currently contained in a section 206 disclosure statement and a section 205 certificate. The practical effect of this recommendation is the combining of the information with the two documents into one document to be provided by the body corporate to a lot owner upon request. We refer to this document as a **body corporate certificate**.

The purpose of the body corporate certificate is twofold. First, the certificate should provide a buyer with lot specific information related to levies, exclusive use and the sinking fund. Secondly, the body corporate certificate provides an opportunity to inform a buyer about key aspects of owning a lot in a body corporate. This is similar to the due diligence checklist in Victoria, which is required to be attached to a section 32 disclosure statement for residential land. The checklist informs the buyer about additional matters relevant to home ownership but not contained within the section 32 statement.

A suggested form of the body corporate certificate is set out in **Appendix B**. The body corporate certificate, similar to other certificates produced by third parties,⁵⁴ is intended to be a *prescribed certificate* given with the seller statement if the property is a lot in a community titles scheme or a lot under the BUGTA. Like other prescribed certificates it will be given to a buyer at the same time as the

⁴⁸ *Body Corporate and Community Management Act 1997 (Qld)* s 206.

⁴⁹ *Body Corporate and Community Management Act 1997 (Qld)* s 205(4).

⁵⁰ *Body Corporate and Community Management Act 1997 (Qld)* s 205(5).

⁵¹ A lot owner, a mortgagee or a person who signs a contract to purchase a lot: *Building Units and Group Titles Act 1980 (Qld)* s 40(5) (definition of 'prescribed person').

⁵² *Building Units and Group Titles Act 1980 (Qld)* s 40(1)(c).

⁵³ For the purposes of this Final Report, a 'lot in a body corporate' includes lots in community titles schemes under the *Body Corporate and Community Management Act 1997 (Qld)* and lots under the *Building Units and Group Titles Act 1980 (Qld)*.

⁵⁴ For example, the current title search and registered plan. Also by analogy it is similar to the position in NSW where a planning certificate under the *Environmental Planning and Assessment Act 1979 (NSW)* s 149 is required to be included with the seller disclosure documents provided under the *Conveyancing Act 1919 (NSW)*.

seller statement. We also recommend that the body corporate certificate remain available to interested persons⁵⁵ as is currently the case under section 205 of the BCCM Act.

Further, the implied warranties in the BCCM Act⁵⁶ for sales of lots in a community titles schemes will remain in place. The Centre recommends that there should be no changes to the implied warranties.

Recommendation 11: A body corporate certificate, in the approved form, should be given to a buyer of an existing lot in a community titles scheme under the *Body Corporate and Community Management Act 1997* or an existing lot in a body corporate under *Building Units and Group Titles Act 1980* before the buyer enters into a contract to buy the lot. The body corporate certificate may be attached to the seller statement or given separately.

6.3.1. Owning a lot in a community titles scheme

The body corporate certificate provides an opportunity to inform a buyer about key aspects of the particular scheme and community titles schemes in general. The objective is to educate a buyer about what to expect particularly in relation to financial obligations and behavioural expectations.

First the Centre recommends a general statement to the effect that:

- the certificate contains important financial and other information about the operation of the body corporate and the buyer's responsibilities as a lot owner;
- the buyer is entitled to rely upon the accuracy of this certificate in relation to the financial information;
- a buyer should undertake further inquiries with the body corporate to obtain all information about the lot and affairs of the body corporate.

As discussed further below the certificate should also provide:

- information about the obligation of lot owners to pay levies to the body corporate;
- information about how the levies are calculated;
- information about the obligation of a lot owner to comply with the bylaws for the scheme and examples of the types of behaviour that may be regulated by bylaws; and
- an explanation about rights in relation to common property.

6.3.2. Identification of the lot

The body corporate certificate should contain basic identifying information about the lot and the body corporate. This information should include:

- the name of the community titles scheme;
- the lot on plan to which the seller statement relates and the unit number;
- the current lot owner as stated on the body corporate roll;

⁵⁵ *Body Corporate and Community Management Act 1997* (Qld) s 205(6) (definition of 'interested person').

⁵⁶ *Body Corporate and Community Management Act 1997* (Qld) s 223.

- the Community Management Statement number and the registered address for service of the body corporate;
- the name and contact details of the person or organisation responsible for maintaining the body corporate records and from whom the buyer can seek further information; and
- the applicable regulation module for the scheme.

6.3.3. Financial information

The body corporate certificate should include specific financial information for the lot being purchased and prescribed information about the obligation of lot owners to pay levies.

The prescribed information should be to the effect that:

All lot owners are required to pay levies to the body corporate each year.

The proportion of the levies payable by each lot owner depends on the relative contribution schedule lot entitlement for the lot.

*The levies payable by the lot owner for the current financial year of **XXXX** to **XXXX** appear below.*

The levies payable may change in each financial year depending on the expenses of the body corporate.

In terms of specific financial information, the body corporate certificate should:

- state the contribution schedule and interest schedule lot entitlements for the lot (and include a statement that some levies are payable on the basis of the interest schedule lot entitlement which may be different to the contribution schedule lot entitlement);
- give details of all levies payable by the lot owner to the administrative fund and sinking fund (including: when levies are payable; whether the payments may be made in instalments; whether the levies are currently paid or unpaid; and details of any discounts or penalties);
- give details of other amounts payable to the body corporate for service agreements, exclusive use by-laws, electricity or gas agreements and special levies; and
- give details of any outstanding body corporate debts owed by the owner of the lot and include a statement this if these amounts are unpaid at the time of settlement, the buyer will be responsible for these amounts.

We note that the same information is currently provided through a combination of a section 206 disclosure statement and a section 205 certificate.

6.3.4. Sinking fund

The body corporate certificate should contain several general statements advising buyers of the maintenance responsibilities of the body corporate and the contribution of a lot owner to the cost of maintenance. These statements should include:

The body corporate is responsible for managing and maintaining the common property and body corporate assets for the scheme.

All lot owners are members of the body corporate and must contribute according to contribution schedule lot entitlements to maintenance, repair and replacement of common property and body corporate assets.

The body corporate is required to establish a sinking fund to pay for future replacement and major repairs of common property and assets.

If the sinking fund is inadequate the lot owners at the time a replacement or repair is necessary will be liable to pay.

These general statements should be supported by a specific disclosure of the sinking fund balance as at the date of the last annual general meeting and the amount required by the sinking fund forecast as at the date of the last annual general meeting.

In addition, the following prescribed statement should be required in the body corporate certificate:

The amount held by the body corporate in the sinking fund as compared to the amount required by the 10 year Sinking Fund Forecast as at the last Annual General Meeting is stated above. Expenditure may have occurred since that date. You can find this information by searching the body corporate records.

Warning: If there is a significant difference between these amounts you should make further inquiries of the body corporate and seek advice from a solicitor prior to signing a contract to purchase a lot in the scheme.

6.3.5. Insurance

Whether a body corporate has in place insurance for property damage and public liability is important information for a buyer. The Centre recommends that sufficient details be provided in the body corporate certificate to confirm the currency of body corporate insurance. In addition, the body corporate certificate should include the following prescribed information:

Body corporate insurance

The body corporate for the scheme must insure the common property and body corporate assets for full replacement value. The body corporate must also have public risk insurance covering the common property and body corporate assets.

The building insurance a body corporate must have is affected by the type of survey plan for the scheme.

Lot owner insurance

The lot owner is responsible for insuring the contents of the lot and any public liability risks which might occur within the lot and if the building is detached or freestanding, may be responsible for insuring the building. More information is available from the Queensland Government website.

Details of current policies of insurance held by the body corporate for damage to the building and public liability are given with this certificate.

If no current body corporate insurance policy for property damage and public liability is attached you should seek legal advice prior to signing the contract.

6.3.6. Common property

A lot owner has the right to use common property in conjunction with other lot owners. Only if the lot owner has the benefit of an exclusive use by-law will the lot owner be entitled to use an area of common property to the exclusion of other lot owners. Owners of lots that benefit from an exclusive use by-law may be required to pay to maintain and repair the exclusive use area.

The body corporate certificate should contain the following prescribed information:

The common property for the scheme is all parts of the building and the land not included in the lot. In a building format lot this will include the outside of the building, windows, doors and sometimes balconies.

Exclusive use areas

- *A lot owner may be entitled to exclusive use of part of the common property, for example, a courtyard, car park or storage area.*
- *Exclusive use must be approved by a resolution of the body corporate. You should ask your solicitor to confirm the exclusive use area was properly approved by the body corporate.*
- *If the lot has the benefit of an exclusive use area the lot owner will usually be required to maintain the area and pay for any repairs.*

6.3.7. By-laws

The Interim Report suggested that the by-laws for a body corporate could be included with the body corporate certificate. The by-laws for a scheme under the BCCM Act are contained in the community management statement (CMS) for the scheme a copy of which can be obtained from the Land Registry. Concern was raised by stakeholders about the cost to the seller of obtaining a copy of the by-laws, potential difficulties for body corporate managers in obtaining a copy (given that there is no statutory obligation for a current copy of the by-laws to be held by the body corporate manager) and whether a buyer will actually read and also understand the impact of the by-laws on them. To accommodate these concerns the Centre recommends a compromise.⁵⁷ A buyer should be provided with information about key types of by-laws that may apply with a recommendation to make further

⁵⁷ It should be noted that the Centre has previously recommended that the by-laws for a scheme be included in the disclosure regime. See Commercial and Property Law Research Centre, *Government Property Law Review: Options Paper Recommendations Body corporate governance issues: By-laws, debt recovery and scheme termination*, released by the Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/_data/assets/pdf_file/0007/508714/qut-recommendations-by-laws-debt-recovery-and-scheme-termination.pdf. However, after consultation with industry groups, the Centre has moderated this position.

inquiries with the body corporate. The body corporate certificate should include prescribed information as follows:

By-laws for the Scheme regulate the responsibilities and conduct of lot owners and occupiers in the scheme. If you buy a lot in the scheme you will be bound to comply with the by-laws. The by-laws may contain rules about:

- *smoking;*
- *whether there are restrictions on keeping pets;*
- *noise on the lot and parties;*
- *parking on lots and common property; and*
- *rights and restrictions about lot owners' use of common property or exclusive use areas.*

The by-laws are part of the Community Management Statement for the Scheme.

Your solicitor can obtain a copy of the by-laws and Community Management Statement for you.

Recommendation 12: A body corporate certificate should contain both lot specific information and prescribed information to inform the buyer about responsibility of living in a community titles scheme.

Lot specific information may relate to:

- **the details of the lot;**
- **contact details of the body corporate secretary;**
- **current levies and other amounts payable by the lot owner;**
- **the contribution and interest schedule lot entitlements;**
- **outstanding amounts payable by the lot owner;**
- **the sinking fund balance as compared to the sinking fund forecast; and**
- **the current insurance for the body corporate.**

Prescribed information may relate to:

- **the obligation of lot owners to pay levies;**
- **how levies are calculated;**
- **body corporate duties to regulate and maintain common property;**
- **rights of lot owners in relation to common property and exclusive use rights;**
- **the ability of the body corporate to regulate behavior and other activities through by-laws.**

6.4. Information not required to be disclosed

Stakeholder responses to the Issues Paper and the Interim Report suggested a number of additional items for inclusion in a seller disclosure regime. Some of the suggestions included:

- a seller commissioned building and pest report;
- flooding information;
- building approvals; and
- disclosure of crimes or other events that may stigmatise the property.

The Centre assessed the suggested additional matters having regard to the Guiding Principles outlined at paragraph 2 above. A key objective of the proposed seller disclosure regime is to create a single legal framework that provides consistency in the content, form and timing of disclosure. The matters recommended for inclusion at 6.2 – 6.3 above meet these criteria.⁵⁸

Whilst the suggested inclusions may be considered by some buyers to be useful information in specific cases, the Centre is of the view that inclusion of these matters is not justified on the cost benefit analysis underpinning the other matters. In some circumstances, the information is readily available or can be acquired at cost to the buyer and there is no cost benefit, by way of measurable value to the buyer, to recommend placing this cost burden onto the seller. In other cases, the information is not readily available from official sources, does not impact on the title to the property or does not impose a cost burden on the owner of the land.

By way of feedback the reasons for not recommending the inclusion of pest and building reports, flood information, building approvals and disclosure of past criminal events concerning the property are outlined below.

6.4.1. Pest and building inspection reports

Seller commissioned pest and building inspection reports can potentially save buyers money, time and may streamline the contract process by eliminating the need for a conditional contract. Such reports form part of the statutory disclosure regime only in the Australian Capital Territory.⁵⁹ Although the seller initially bears the cost of the pest and building report, the legislation provides for the buyer to reimburse the seller on settlement of the sale.⁶⁰

Under the ACT model, the buyer is entitled to compensation for any loss or expense incurred for a report which is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care.⁶¹ The relevant regulation in the ACT requires that the report must be completed in accordance with the relevant Australian Standard.⁶² The report must also include:

- detail about professional indemnity insurance held by the inspector and a certificate of currency; and
- a statement that no reliance may be placed on the report for any contract entered into more than 180 days after the date of the inspection.⁶³

New South Wales considered the viability of requiring a seller to provide certain pre-purchase reports (including a pest and building inspection report) in 2010.⁶⁴ The Final Report from that review

⁵⁸ See discussion at paragraph 6.1 above.

⁵⁹ *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(1)(h)(iii)-(iv).

⁶⁰ *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 18(1).

⁶¹ *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 19. The Act specifies that there are certain categories of people who should not prepare the report including a family member of the seller etc: see s 9(3).

⁶² *Civil Law (Sale of Residential Property) Regulation 2004* (ACT) cl 7(1).

⁶³ *Civil Law (Sale of Residential Property) Regulation 2004* (ACT) cl 7(3)-(4).

⁶⁴ Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010).

recommended the introduction of mandatory pest and building inspection reports as part of the mandatory seller disclosure obligations. The recommendation was not implemented in New South Wales.⁶⁵

Some advantages of requiring the disclosure of a seller commissioned pest and building inspection report include:

- avoiding a situation where several prospective purchasers obtain different reports for the same property;
- addressing the issue of a prospective purchaser paying for reports on multiple properties they are interested in;⁶⁶ and
- ensuring the report is available upfront which is particularly helpful when the property is for sale by auction.⁶⁷

There are some disadvantages of requiring seller commissioned reports which include:

- the risk that sellers may shop around for reports that are favourable to the property⁶⁸ and, as a result, buyers will continue to commission their own reports and incur additional costs;
- issues surrounding the currency of the reports. This is an issue if a property takes an extended period of time to sell;⁶⁹ and
- issues surrounding the qualifications of the relevant inspectors, licensing of the inspectors, quality of the reports produced and independence of the inspectors.⁷⁰

It has been argued even if the seller provides a pest and building report, buyers will duplicate such reports in any event to ensure that the report is accurate as some of the information may be subjectively interpreted.

Strong arguments were submitted either in favour of or against the inclusion of a mandatory seller commissioned pest and building report, but no evidence was presented of a strong need for the seller to provide such reports to a buyer prior to contract. Relevantly all standard REIQ contracts contain a standard clause for the contract to be subject to the buyer obtaining a building and/or pest inspection report. Most buyers take advantage of this provision to obtain their own pest and building report. On

⁶⁵ There was a change of Government in New South Wales following the issue of this Report and the incoming government kept the existing system in place: see Heath Aston et al, 'Building inspectors to be licensed', *Sydney Morning Herald* (online), accessed 20 Jan 2017 <https://www.domain.com.au/news/calls-for-building-inspectors-to-be-licensed-20110813-1irxy/>.

⁶⁶ Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010), 2.

⁶⁷ Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010), 2.

⁶⁸ Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010), 2.

⁶⁹ Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010), 3.

⁷⁰ Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010), 3 and 12.

balance the Centre is of the view that the benefits of mandating the disclosure of such reports by the seller are outweighed by the disadvantages.

6.4.2. Flood Information

Whether a property is subject to flood events will be a matter of interest to most buyers and potentially it will impact on the value of the property. In most areas of Queensland information about flooding is freely available, usually online, from the local government. Generally a search will reveal if the property has been subject to flooding in the past, potential sources of flooding (rivers, creeks, overland flow or storm water), estimated flood levels or is within a designated flood planning area.

Potential difficulties in a mandating seller disclosure of flood information are:

- a. different information is available in different local government areas; and
- b. how to describe the nature of the information a seller should disclose as not all local governments provide flood reports for each property in their area.

There is no accepted meaning of 'flood' or 'flooding' or accepted meaning of 'flood prone' land. For example, is flooding that has occurred because a property is located in a flood prone area the same as a one-off inundation of water following a particularly severe storm because of stormwater? Are both properties 'flood prone' or subject to flooding sufficient to require disclosure? Is a seller required to disclose information from their own personal knowledge or only the information available from an official search?

While there is a significant amount of information available from some local governments (including maps) regarding flood risk areas the quality of the information varies. For properties within the Brisbane City Council local government area, potential purchasers (and sellers) can obtain a free 'FloodWise Property Report' instantaneously which provides information about flood risks for a specified lot or property. The availability of similar information in other local government areas depends on the size of the local council, record keeping practices and the availability of information particularly since recent flooding and other natural disaster events in Queensland.

The Queensland Reconstruction Authority has an ongoing program of preparing and releasing floodplain maps for all of Queensland. Those maps that have been completed are available for free online. Similarly, the Department of Natural Resources and Mines has an interactive flood check available online for all of Queensland. It includes flood imagery for 2010-2011.

The Centre does not recommend the imposition of a statutory obligation on a seller to disclose flooding information at this time. This view is influenced heavily by the difficulties associated with clearly articulating the meaning of 'flood information' or for the seller to state whether the property is 'flood prone' together with inconsistency in the information available from official sources.

6.4.3. Building Approvals

There is currently no requirement in Queensland for a seller to disclose details of building approvals for a property or a clear right for a buyer to terminate a contract if a structure does not have all

approvals.⁷¹ All buildings for human habitation require an initial building approval and at various stages of construction the building will be inspected by a building certifier to check compliance with the approval. Upon final construction a building will either require a final certificate (dwelling houses) or a certificate of classification (all other buildings).⁷² This is a point of distinction between dwelling houses and other buildings.

A building that requires a certificate of classification cannot be legally occupied unless a valid certificate of classification is issued. A buyer is entitled to refuse to complete if a certificate of classification is not issued, on the basis the seller has failed to give vacant possession.

A dwelling house however, does not require a final certificate for legal occupation. There was no evidence provided in the consultation process to suggest that dwellings with all approvals are less likely to have structural defects than dwellings without all approvals. A buyer can only discover structural defects through a proper building inspection. As discussed above, the standard REIQ Contracts include a building and pest inspection clause for the benefit of buyers. The need for a building inspection report is not removed merely by requiring a seller to provide details of approvals. The position may be different if the building does not have an approval at all. In this case the structure may be considered illegal depending upon its quality and the ability to obtain a retrospective approval. A buyer may have a right to terminate if no approval can be obtained on the basis of a substantial breach.

A further issue is the absence of accurate and complete records in some local government areas. Sellers of land where building work occurred prior to the seller becoming the owner of the land would need to rely upon a search of local government records. In addition to the cost of undertaking this search, records are often incomplete either because the local government destroys the record after a period of time or due to loss of the records through natural disasters. This places a seller at a disadvantage in being able to readily access information about approvals for building work undertaken prior to the seller becoming the owner of the land.

In the Centre's view imposing an additional cost on a seller to obtain information about approvals without clear evidence of a benefit to the buyer from the information is not justified in this case. Maintaining a right for the buyer to obtain a building and pest inspection report with the ability to terminate if the buyer is not satisfied is of more value to a buyer.

6.4.4. Stigmatised property

The REIQ submitted that a seller should be required to disclose past events or crimes that have the effect of stigmatising the property. This submission was not supported by other stakeholders. Several examples were given where the past use of the property may be of concern to buyers and impact on the price a buyer is willing to pay. Examples included illegal activity (e.g. a drug lab), or where there has been an untimely death, or multiple deaths through murder, fire or similar cause.

⁷¹ A number of other jurisdictions require the disclosure of this information under the statutory regimes in place. See for example *Civil Law (Sale of Residential Property) Regulation 2004 (ACT)*, reg 7(6)). Details of building permits are required to be disclosed in Victoria: *Sale of Land Act 1962 (Vic)* s 32E.

⁷² Certificates of classification are required for all class 2-9 buildings under the Australian Building Code.

The REIQ's rationale for obliging a seller to disclose this type of information was twofold. First it was submitted that it may impact on the value of the property and secondly, the failure of a seller to disclose that information exposes a real estate agent to risk of liability for a failure to disclose a material matter to the buyer. Under the *Property Occupations Regulation 2014 (Qld)*⁷³ a real estate agent is obliged to:

(3)...take reasonable steps to find out or verify the facts material to the sale, purchase, exchange or lease that a prudent real estate agent would have found out or verified to avoid error, omission, exaggeration or misrepresentation.

The REIQ further submitted that the lack of clarity about what facts may be material to the sale and the potential breadth of this provision expose an agent to liability if a stigma arising from the type of events identified is not disclosed to a buyer. In support of their submission reference was made to the decision in *Hinton v Commissioner for Fair Trading*⁷⁴ where an agent was prosecuted for misleading conduct after failing to disclose to a buyer the fact that a triple murder occurred in the dwelling. It is important to note that the real estate agent's liability in that case arose from the misleading conduct of the agent. When asked a relevant question by the buyer, the real estate agent failed to disclose the crime that had occurred, even though the agent was aware of the crime.

To the Centre's knowledge there are no reported decisions where an agent has been sued by a buyer for failing to disclose a crime that had occurred on the property. In fact in a majority of the cases where real estate agents are successfully sued it is because of misleading statements made by agents who have knowledge of the facts and choose not to disclose all of the information.⁷⁵ In contrast, where an agent merely conveys the instructions of the seller or other party, without adopting the statement as their own, no liability is incurred.⁷⁶ Whether an agent has taken reasonable steps to discover all material facts, while potentially relevant in a negligent misstatement claim (where an agent makes a representation about a matter as opposed to no representation) will usually be irrelevant to a claim for misleading conduct. Consequently, the Centre is of the view that while clarity about the scope of section 20 of the *Property Occupations Regulation 2014 (Qld)* may be desirable, it will not be achieved by imposing an obligation on the seller to disclose certain stigmas or other facts about a property.

The Centre acknowledges that most buyers may be reluctant to purchase a property that previously operated as a drug lab or in which criminal activity occurred. In the Centre's view the rationale for introduction is not consistent with the Guiding Principles applied to other categories of information. In addition, seeking to maintain disclosure of this type would occasion the following difficulties:

- Describing and defining what amounts to a 'stigma' that must be disclosed with the requisite degree of certainty for legislation is doubtful. The view of an individual buyer about what is important and whether it impacts the value of a property will differ widely. Issues that would need to be considered:

⁷³ *Property Occupations Regulation 2014 (Qld)* s 20.

⁷⁴ [2006] NSWADT 257.

⁷⁵ See for example *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625.

⁷⁶ See for example *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592.

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- Should the stigma constitute a crime? If yes what type of crimes should be included? What if there is a death on the property but no crime was committed? How should legislation describe a 'stigma' so as to give sellers clarity about what should be disclosed? Without certainty in the legislative provisions a seller may fail to disclose a matter and be exposed to loss of the contract or protracted disputes.
- If a description can be agreed, how far in the past is a seller required to investigate? Can a common number of years be agreed? Is there an objective measure of how long a stigma affects a property?
- Will a positive obligation to disclose these types of events have the effect of economically sterilising the property for the foreseeable future?
- How would a seller obtain information about past events that occurred on the property? One of the consequences of requiring a seller to disclose is to impose a positive duty on the seller to make reasonable inquiries to ensure the information provided is accurate. To the Centre's knowledge there are no readily searchable databases to find out this type of information. If, as suggested, these should be statements made 'to the knowledge of the seller' what is the value to a buyer? A practice will inevitably develop where sellers will take no steps to inquire about past events on the basis they have no knowledge and are able to make such a statement. Any such expression of information would have to be stated sufficiently with certainty to satisfy a court if the buyer's right to terminate were challenged.
- The fact that an event or crime occurred in the past is not a defect in title nor a continuing financial obligation. If this type of event is disclosed, it necessarily opens debate about why other matters related to value, such as building defects, flooding or approvals should be excluded. Each of these matters may impact the value of a property and are more likely to occur than the existence of a 'stigma'.
- Introducing an obligation for a seller to disclose a particular matter so as to remedy a perceived uncertainty within the *Property Occupations Regulations 2014* (Qld) governing real estate agent obligations is not a compelling reason. Real estate agents have an obligation not to engage in misleading or deceptive conduct. If, in the course of negotiations, it becomes apparent to an agent that a particular past use or event is material to an individual buyer, the agents' obligation under the present law is quite clear. An agent must not engage in misleading or deceptive conduct. The occasions upon which this may mean an agent should make disclosure to a buyer about a matter the seller has instructed should not be disclosed will be relatively rare and should be dealt with on a case by case basis. Where an agent's duty to the seller is in conflict with compliance under the *Australian Consumer Law*, legal advice should be sought.

The Centre does not consider that there is a valid case for imposing a positive obligation on a seller to disclose past criminal events or other similar events that may stigmatise the property. Imposing this type of obligation is more likely to create legal disputes between the parties about the accuracy of the information and expose sellers to a higher risk of contract termination. Further, any duty of disclosure imposed on a seller will not alter the prohibition on misleading conduct under the *Australian Consumer Law*, which is clearly applicable to real estate agents and potentially to sellers.

As an alternative to imposing a positive obligation on a seller to disclose the matters discussed at 6.4.1 to 6.4.4 above, the Centre recommends that a clear warning be given to potential buyers that particular information (such as building integrity, flooding, existence of building approval or criminal activity) is not required to be disclosed by the seller. The buyer should be directed to make their own inquiries in relation to these matters. In the Centre's view this achieves the dual purpose of educating buyers about further inquiries they should make about the property before signing a contract and alerting them to the fact that the seller is not responsible for disclosing this information to the buyer.

Recommendation 13: The seller statement should contain a clear warning to potential buyers that particular information which may be relevant to the value of the property is not included with the seller statement.

The warning should read:

This statement does not include information about:

- ***Flooding history***
- ***Structural soundness of the building or pest infestation***
- ***Current or historical use of the property***
- ***Current or past building approvals for the property***
- ***Limits imposed by planning laws on the use of the land***
- ***Services that are or may be connected to the property***

You are encouraged to make your own inquiries about these matters prior to signing a contract.

You may not be able to terminate the contract if these matters are discovered after you sign.

7. Compliance by seller with disclosure obligation

The steps a seller is required to take to comply with their disclosure obligations should be clear. In addition to the requirements of timing,⁷⁷ form of disclosure⁷⁸ and content⁷⁹ the legislative framework will need to provide for:

- a. the methods a seller may use to give or make the seller statement (and accompanying documents) available to the buyer; and
- b. the point in time at which the accuracy of the information will be assessed.

For the purposes of this Part, reference to a seller statement includes a reference to all of the prescribed certificates and the body corporate certificate given with the seller statement.

7.1. Methods of giving a seller statement

As recommended at 4.2 a seller statement should be provided to a buyer prior to the buyer entering into a contract. The appropriate method for providing a seller statement depends on the form of the statement. Recommendation 7 states that:

- a. a seller statement including all prescribed information, prescribed statements and prescribed certificates should be adopted; and
- b. the legislation should not require the prescribed certificates to be attached to the seller statement but a seller should be required to provide all of the information and certificates at the same time.

The purpose of this recommendation is to allow flexibility for sellers to provide the information in the most appropriate form depending on the circumstances. In particular, it should be clear that a seller statement and other disclosure documents can be provided to a buyer in paper or electronic format. To facilitate this option for the seller the Centre recommends that specific legislative authority be included for a seller statement to be 'given' or 'made available' to a buyer either in paper or electronically. The purpose of allowing a seller statement to be made available to a buyer is to facilitate the electronic delivery of a seller statement using an electronic repository (for example Dropbox or DocuSign).

A seller statement may be *given* if handed to a buyer, sent by facsimile or email to a buyer.

A seller statement may be made '*available*' if:

⁷⁷ See paragraph 4 above.

⁷⁸ See paragraph 5 above.

⁷⁹ See paragraph 6 above.

- a buyer has been provided with a link to the seller statement located on a website or other shared location;⁸⁰ or
- copies of the seller statement are on conspicuous display and offered to prospective buyers at any inspection conducted on the property or for a sale by auction, on the day of the auction.⁸¹

Specific legislative authority for electronic delivery of a seller statement removes the need for the seller to rely on the provisions of the *Electronic Transactions (Queensland) Act 2001*, s 11.

Recommendation 14: The seller disclosure legislation should authorise a seller statement to be:

- a. given to the buyer in paper or electronic form (via an electronic communication); or**
- b. made available to the buyer by:**
 - (i) providing a link to a website or other shared location; or**
 - (ii) for a sale by auction, by being put on conspicuous display on the day the auction is held.**

7.2. Accuracy

In order for a seller statement to have value as a disclosure document, a buyer should be able to rely on it as being accurate. The Centre recommends that the seller statement should be accurate as at the date it is given or made available to the buyer. This approach is consistent with the BCCM Act section 206 which provides for the section 206 disclosure statement to be accurate at the time it is given to the buyer.

The practical impact of this recommendation is:

- a. the primary obligation of the seller is to ensure that the information provided to a buyer is accurate at the time it is given;
- b. there should be no obligation to update the information after it is given, but if the information becomes inaccurate during the marketing process a seller should update the statement prior to giving it to other proposed buyers; and
- c. if the information is also required for completion of the contract of sale,⁸² a seller will need to update the information in any event to ensure it is accurate as at the Contract Date or risk potential contractual liability to the buyer.

The Centre does not recommend the imposition of a continuing disclosure obligation on a seller. Continuing disclosure obligations impact adversely on transaction costs and increase complexity for both parties with little reciprocal benefit to the buyer.⁸³ Limiting a seller's obligation to the provision

⁸⁰ This reflects the approach adopted in Victoria in 2014 in relation to the due diligence checklist being made available: *Sale of Land Act 1962 (Vic) s 33B(6)*.

⁸¹ This reflects the approach adopted in Victoria in 2014 in relation to the disclosure of a due diligence checklist: *Sale of Land Act 1962 (Vic) s 33A*.

⁸² This will include details of registered, unregistered and statutory encumbrances, tree applications or orders, any new notices issued by a local government or State government.

⁸³ Christensen et al, 'Evaluating Information Disclosure to Buyers of Real Estate – Useful or Merely Adding to the Confusion and Expense?' (2007) 7 *Queensland University of Technology Law Journal* 148, 171.

of information accurate at the time the seller statement is given, coincides with current conveyancing practice and contractual provisions requiring the seller to warrant a certain state of affairs, as at the date of contract.⁸⁴ This is on the basis it is up to the buyer to make relevant inquiries to satisfy themselves of the truth of the statements after contract. Further a buyer is unlikely to be disadvantaged by this recommendation.

Recommendation 15: The seller statement should be accurate at time it is given or made available to the buyer. No obligation should be imposed on the seller to update the information after it is given.

7.3. Onus of proof and evidence of compliance

In the event of a dispute about whether a seller statement was given or made available by the seller prior to contract a seller should bear the onus of proving compliance with the statutory obligation.

The Centre recommends that the onus of proving a seller statement was given or made available to a buyer should rest with the seller. This reflects the fact that control over the giving of a seller statement rests with the seller or their agent.⁸⁵

Further a seller should be able to rely upon a buyer's acknowledgment of receipt as conclusive evidence of the fact the statement was given to the buyer, unless the buyer proves the acknowledgement is a forgery.

Recommendation 16: In the case of a dispute, the onus of proving that the seller complied with the statutory disclosure obligation should rest with the seller.

⁸⁴ See for example clause 7.4 of the REIQ Houses and Land Contract 13th ed which provides for certain seller statements as at the Contract Date.

⁸⁵ This approach was adopted under section 365(5) of the *Property Agents and Motor Dealers Act 2000* (Qld) which provided: '*If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.*' The provision was removed from the Act following amendments in 2010.

8. Consequences of a failure to comply

One of the challenges posed by a single coordinated legislative regime for seller disclosure is achieving a balanced approach to the consequences of failing to disclose. As outlined in the Issues Paper there is no uniform approach in Queensland to seller disclosure which is evident not only in the nature of the obligation but also in the consequences of non-compliance. There is inconsistency in relation to terminology, the nature of the remedy, the timing and the effect of the remedy. Some of the difficulties in determining a buyer's rights across the range of remedies were highlighted by stakeholders who supported the need for a co-ordinated remedial regime.

The Centre is in favour of simplifying and harmonising the remedial response to a contravention of the seller disclosure regime subject to the following considerations:

- a. the Centre recommends the implementation of a single co-ordinated statutory regime occur in stages. This will necessitate a staged process to the harmonisation of remedies for non-compliance, particularly in the case of an existing statutory disclosure obligations. Initially different remedies may remain under existing legislation;
- b. a buyer should be given a right to terminate a contract where a seller has failed to comply with their disclosure obligations, but this right should be subject to a material detriment test so that a buyer cannot unfairly exercise the right for technical non-compliance; and
- c. existing buyer rights for a failure to comply with statutory disclosure obligations within the BCCM Act should be maintained where appropriate.

The proposed remedial response is detailed in two parts. First the Report will detail the remedies available to a buyer under the proposed seller disclosure regime as a result of a contravention by the seller. Secondly, the Report will identify any inconsistencies between the suggested approach and rights under existing statutory disclosure legislation.

8.1. When does a seller fail to comply?

A contravention of the proposed seller disclosure regime that requires a remedial response may occur if the seller:

- a. fails to give a seller statement at all;
- b. fails to give a seller statement prior to the buyer entering into the contract;
- c. fails to give a seller statement in the approved form; or
- d. gives a seller statement that is inaccurate either because the information provided is not correct or because relevant information or a prescribed certificate has not been provided.⁸⁶

The Centre recommends that the buyer should have no rights against the seller for (c) if the seller has substantially complied with the approved form.

⁸⁶ An inaccuracy may occur where the information provided is incorrect or where information is omitted.

8.2. What is the appropriate remedial response?

The Centre is of the view that failing to provide a seller statement, or providing a seller statement that is inaccurate should be viewed as a serious contravention of the legislation.

To promote compliance with the statutory obligation a seller who fails to give a seller statement at all or prior to contract should commit an offence. This approach is similar to the position in the Australian Capital Territory where the seller of a residential property commits an offence if all the required documents are not available for inspection when an offer to buy the property may be made to the seller.⁸⁷ Further, this approach is similar to disclosure requirements in other Acts. For example, under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)*⁸⁸ a person selling land affected by an application or an order under that Act who fails to give the buyer a copy of the application or order may face a penalty of up to 500 penalty units.

Recommendation 17: Failure by the seller or agent to make the seller statement available to the buyer prior to entering into a contract of sale is an offence.

8.2.1. Should a buyer be able to terminate the contract as a result of the contravention?

In most other Australian jurisdictions a buyer is entitled to terminate a contract for the purchase of land if a seller fails to provide the buyer with the required seller disclosure prior to contract.⁸⁹

The Centre recommends that a buyer should be entitled to terminate the contract if the seller fails to comply with the seller disclosure regime as outlined below. A statutory right for the buyer to recover their deposit after termination should be included.

8.2.2. Failure to give seller statement prior to contract

Where a seller fails to give a seller statement either at all or prior to contract, there are strong arguments in favour of providing the buyer with a right to terminate as a deterrent against non-compliance. Failure to provide the buyer with a seller statement prior to contract deprives the buyer of information valuable to the buyer's decision to enter the contract. Allowing a buyer to terminate if the seller statement is not given to the buyer creates a strong incentive for a seller to comply with the requirements. A further argument in favour of providing a termination right is to ensure consistency with the rights of a buyer under the BCCM Act for failure to provide seller disclosure statement under section 206 of the BCCM Act.

The Centre recommends that a buyer should be entitled to terminate a contract, subject to the limits outlined at 8.3, if the seller fails to provide a seller statement at any time prior to contract.

⁸⁷ *Civil Law (Sale of Residential Property) Act 2003 (ACT)* s 10.

⁸⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* s 83.

⁸⁹ See for example, *Sale of Land Act 1962 (Vic)* s 32K; *Conveyancing (Sale of Land) Regulation 2010 (NSW)* reg 16(3).

8.2.3. Failure to give an accurate seller statement

A seller may fail to give an accurate seller statement by incorrectly describing a matter in the statement, by omitting information or by failing to provide one of the prescribed certificates. For example, the seller may provide a seller statement but fail to attach a copy of the rates or water notice or, if a lot in a community titles scheme, a copy of the body corporate certificate. Alternatively, the seller may provide a seller statement but fail to disclose the existence of an easement. All of these omissions are a failure to comply with the seller disclosure regime which in the Centre's view should allow a buyer, within limits, to terminate the contract.

One specific issue that requires special consideration is where there are inaccuracies in the body corporate certificate and therefore inaccuracies in the seller statement. The certificate will be prepared by the body corporate and in the event of inaccuracies in the financial information, a buyer will be able to rely upon the body corporate certificate as conclusive evidence against the body corporate.⁹⁰ Should this mistake also allow the buyer to terminate the contract?

One suggestion is that where the buyer is able to rely upon this information as against the body corporate there should be no right to terminate, but in all other cases the buyer should be entitled to terminate. In the Centre's view a buyer may still be disadvantaged in the long term by a mistake in the financial information despite being able to enforce the mistake against the body corporate.

8.3. Limits on right to terminate

Under the proposed seller disclosure regime a seller will provide some information from their own knowledge but must necessarily rely upon information and advice from third parties. Mistakes may therefore occur in a seller statement that are not due to a lack of diligence on the part of the seller. In this context there is a reasonable argument for imposing limits on the buyer's right to terminate, particularly for technical non-compliance caused by a third party.⁹¹

In Queensland, the right of a buyer to terminate a contract for an inaccuracy in the section 206 disclosure statement is subject to a time limit⁹² and proof that the buyer is materially prejudiced by the inaccuracy. To determine if the buyer is materially prejudiced a court must consider whether having regard to the personal circumstances of the buyer, they would be substantially disadvantaged by the inaccuracy.⁹³ Application of this test is difficult due to the requirement for knowledge of the personal circumstances of the buyer.

⁹⁰ The Centre recommends retaining this provision currently expressed in the *Body Corporate and Community Management Act 1997* (Qld) s 205(5).

⁹¹ Where the information provided by the seller includes a true and complete copy of what was provided by a statutory authority the seller will not be responsible for inaccuracies or defects in the information provided by that statutory authority: *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at [66].

⁹² The limit is 14 days after the buyer or their agent receives a copy of the executed contract: *Body Corporate and Community Management Act 1997* (Qld) s 209(2).

⁹³ See for example *Mirvac Queensland Pty Ltd v Wilson* [2010] QCA 322.

In Victoria, the right to terminate the contract for an inaccuracy in the disclosure statement or a failure to give the disclosure statement, is limited if the:

- seller has acted honestly and reasonably and ought fairly be excused for the contravention; and
- the buyer is substantially in as good position as if the seller complied with his or her disclosure obligations.⁹⁴

New South Wales has adopted a slightly different approach. Under the New South Wales legislation the following conditions must be satisfied before the buyer is entitled to terminate:

- the breach constitutes a failure to disclose to the buyer the existence of a matter affecting the land;
- the buyer was unaware of the existence of the matter when the contract was entered into; and
- the buyer would not have entered into the contract had she or he been aware of the matter.⁹⁵

The Centre favours the New South Wales approach. Such a test is objective and arguably provides a better balance between the seller's and the buyer's rights.

The effect of adopting the NSW approach is that a buyer will only be able to terminate the contract if the undisclosed matter is material to a buyer's decision to enter into the contract. One consequence is that it is unlikely a buyer will be able to terminate if a rates notice or water notice is not attached. A reasonable buyer will be aware that rates are payable on the property and failure to attach the notice will not be material. Failure to disclose an easement restricting use of a substantial part of the property on the other hand, may be material. A similar situation exists in relation to the body corporate certificate – an error for example in the name of the person responsible for maintaining the body corporate records may not give rise to a right to rescind. On the other hand, failure to disclose the existence of an exclusive use area that requires the lot owner to pay to maintain the area at significant cost may be material.

Further consideration may need to be given to the consistency between this recommended approach and the current material prejudice test which is used for off-the-plan lots under the BCCM Act. Different considerations potentially arise in the context of off-the-plan lots.

In addition to the requirement of materiality consideration may be given to imposing a time limit for exercising the right to terminate. Currently, a buyer of a lot in a community titles scheme must exercise the right to terminate under section 209 of the BCCM Act for an inaccurate statement within 14 days of the buyer or their agent receiving the contract.⁹⁶ The Centre recommends the adoption of consistent rights for the failure to disclose any matter. For the avoidance of doubt, this means that the 14 day period under the BCCM Act would be removed and the buyer would have a right to terminate up until settlement.

⁹⁴ *Sale of Land Act 1962* (Vic) s 32K(4).

⁹⁵ *Conveyancing (Sale of Land) Regulation 2010* (NSW) reg 16(3).

⁹⁶ If the section 206 disclosure statement is not given at all, the buyer is entitled to terminate at any time prior to settlement: *Body Corporate and Community Management Act 1997* (Qld) s 206(5).

Recommendation 18: If the seller:

- fails to provide the seller statement (or body corporate certificate, where required) to the buyer prior to the buyer entering into the contract of sale of the property; or
- provides a seller statement (or body corporate certificate, where required) that is inaccurate,

the buyer is entitled to avoid the contract at any time prior to settlement only if:

- the failure to disclose to the buyer or the defect in the seller statement or body corporate certificate relate to the existence of a material matter affecting the land;
- the buyer was unaware of the existence of the matter when the contract was entered into; and
- the buyer would not have entered into the contract had she or he been aware of the matter.

8.4. Compatibility with existing statutory rights

The existing seller disclosure requirements in Queensland require the seller to provide disclosure in relation to the existence of the following matters:

- undischarged coastal protection or tidal works notice;⁹⁷
- contaminated land recorded in the environmental register and other disclosures required under the *Environmental Protection Act 1994* (Qld);⁹⁸
- tree applications and orders;⁹⁹
- building work carried out by a person not licenced to carry out that building work;¹⁰⁰
- swimming pools – offence and liable to a penalty;¹⁰¹
- obligations in relation to revetment walls in waterways within the Gold Coast City Council.¹⁰²

Currently under each of the Acts listed above (**Specified Disclosure Acts**) a buyer is given various rights in the event the seller fails to comply with the provisions of the Act. Table 1 sets out the relevant contravention by a seller, the buyer's right in the event of a contravention and the limits on the exercise of those rights.

⁹⁷ *Coastal Protection and Management Act 1995* (Qld) s 65.

⁹⁸ *Environmental Protection Act 1994* (Qld) ss 347, 362 and 408.

⁹⁹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83.

¹⁰⁰ *Queensland Building and Construction Commission Act 1991* (Qld) s 47(1).

¹⁰¹ *Building Act 1975* (Qld) s 246ATF.

¹⁰² *Gold Coast City Council Local Law No. 17 (Maintenance of Works in Waterway Areas) 2013*. Note also the subordinate law, *Local Law 17.1 (Works in Non Coastal Waterway Areas) 2013*.

Table 1: Comparison of existing statutory remedies

Act	Contravention	Buyer rights	Limits
<i>Coastal Protection and Management Act 1995 (Qld)</i>	Failure to give notice at least 14 days prior to settlement of an undischarged coastal protection notice under s 59 or an undischarged tidal works notice under s 60	Agreement is of no effect which means the buyer can refuse to settle	Right may be lost if buyer affirms the contract and settles No notice of termination required No test of materiality
<i>Environmental Protection Act 1994 (Qld)</i>	Failure to give notice prior to contract that the land is recorded on the CLR or EMR: s 408	Buyer is entitled to terminate	Exercise right at any time up to settlement or possession Notice in writing No materiality test Right may be limited if a seller gives notice after contract to remedy contravention – must exercise within 21 business days of receiving the notice
<i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)</i>	Failure to give the buyer copies of a tree application or order prior to buyer signing the contract	Buyer can terminate the contract	Exercise right prior to settlement Notice in writing to the seller No test of materiality Seller liable to comply with tree order after settlement
<i>Queensland Building and Construction Commission Act 1991</i>	Failure to give a notice about unlicensed building work under s 47	Contract deemed subject to contractual warranty about quality	
<i>Building Act 1975, (Swimming pools)</i>	Failure to give the buyer a notice of no pool safety certificate prior to contract Failure to give the buyer a pool safety certificate (if issued) prior to settlement	No rights	
<i>Gold Coast Local Law¹⁰³</i>	Failure to include the information in s 15 of the Local Law as a term of the contract	Buyer may terminate the contract	Exercise right at any time prior to settlement Notice in writing to the seller

¹⁰³ The right of a buyer to terminate a contract for a failure to comply with the *Gold Coast City Council Local Law No 17 (Maintenance of Works in Waterway Areas) 2013* is altered by the Court and Civil Legislation Amendment Bill 2017 (Qld), which proposed to amend section 57 *Property Law Act 1974* (Qld) to provide that a statutory instrument cannot give a buyer a right to terminate a land contract unless specifically permitted by regulation.

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It is clear that there are a number of inconsistencies between the remedies proposed for the statutory seller disclosure regime and those contained in the Specified Disclosure Acts:

- not all contraventions allow a buyer to terminate the contract;
- there is no requirement for the contravention to materially affect the position of the buyer; and
- some provisions impose a time limit on the right to terminate.

If the proposed remedies for the statutory seller disclosure regime are available in relation to a failure to disclose a matter or information in the seller statement, this will represent a significant change in the case of some Specified Disclosure Acts. The Centre recognises that it may not be appropriate to create a new right for a buyer to terminate where there is currently no right. A review of each Specified Disclosure Act is required in light of the proposed seller disclosure regime to ascertain if the information should still be disclosed and the appropriate remedy in each case.

In the first stage of the implementation this may not be possible. To preserve the status quo in relation to the Specified Disclosure Acts it is recommended that where the failure of a seller to disclose a matter is a contravention of a Specified Disclosure Act, the buyer's remedies should be limited to the current remedies under that Act. This will mean that in the first stage of the seller disclosure regime a failure by a seller to comply with the *Coastal Protection and Management Act 1995* (Qld), *Environmental Protection Act 1994* (Qld) and *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) will allow the buyer to terminate the contract in accordance with the provisions in those Acts. In the case of the *Queensland Building and Construction Commission Act 1991* (Qld) and *Building Act 1975* (Qld) no new right to terminate is granted to the buyer.

Recommendation 19: Where another Act provides a remedy for a failure to disclose information on the sale or transfer of land, the remedy under that Act will take precedence over the remedy under the statutory seller disclosure regime.

9. Implementation and Review

9.1. Staged Implementation

Guiding Principle 4 provides:

A single legal framework should be established providing consistency in the content and timing of disclosure and remedies available for a failure to comply.

As a result of the current uncoordinated and disparate approach to seller disclosure the Centre recommends a staged approach to introduction of a unified statutory regime. The final outcome of these stages should be the adoption of a statutory seller disclosure regime contained within one statute.

Stage 1: The Centre recommends the introduction of a statutory seller disclosure obligation for sales of freehold land regulated by a dedicated part of the *Property Law Act 1974* (Qld) (or similar legislation). In this initial stage the legislative framework should include:

- a. an obligation on a seller of freehold land to provide a buyer with a seller statement prior to the buyer entering into the contract;
- b. the obligation may be subject to a number of exceptions or exclusions as outlined in this Final Report;¹⁰⁴
- c. the content of the seller statement should be listed and should include ‘prescribed information’, ‘prescribed statements’ and ‘prescribed certificates’. An approved form of seller statement should also be developed and approved;¹⁰⁵
- d. the obligation of a seller of an existing lot in a community titles scheme or under the BUGTA to provide a body corporate certificate to a buyer prior to the buyer entering into a contract should be removed from the BCCM Act and BUGTA and placed in this Act. A body corporate certificate should be a prescribed certificate under the seller disclosure regime;
- e. the obligation of a body corporate to provide a seller with a body corporate certificate should remain in the BCCM Act and the BUGTA. The list of matters and the form of the body corporate certificate should be prescribed by each Act. It should be clear that a body corporate is required to provide the body corporate certificate to a lot owner as seller or any other interested party for a prescribed fee and within a prescribed period;
- f. remedies available to a buyer for a failure by the seller to provide a seller statement prior to contract or where the seller gives an inaccurate statement should be specified in the Act. As discussed this should include a right for a buyer to terminate only if the buyer is materially disadvantaged by the failure;
- g. the rights of a buyer under current Specified Disclosure Acts should be retained and remain available to a buyer where the failure to give a seller statement is a failure to comply with the Specified Disclosure Act.

¹⁰⁴ Discussed at paragraph 3.2 above.

¹⁰⁵ Discussed at paragraph 5 above.

Stage 2: In Stage 2 consideration should be given to incorporating the seller statements and warranties contained within the REIQ standard contracts and the BCCM Act¹⁰⁶ within the seller disclosure regime. This stage may also include the development of a future strategy for incorporating all statutory disclosure obligations related to land within the one statute, similar to the approach in NSW and Victoria.

Stage 3: The Centre recommends that after the seller disclosure framework has been in operation for 18 months, during Stage 3:

- a. a review of the operation of the legal framework should be undertaken for the purpose of assessing its operation and potentially adding or subtracting information a seller should be required to provide;
- b. as part of the review, a plan should be developed in consultation with relevant stakeholders for re-locating the seller obligations within the Specified Disclosure Acts to the *Property Law Act 1974* (Qld). As part of the review consultation will be required in relation to the consolidation of buyer remedies arising from inclusion of these statutory provisions within one Act;
- c. as discussed below consideration should be given to the development of a central government portal where information related to particular parcels of land can be obtained by sellers and buyers.

9.2. Access to government information

A number of stakeholder submissions supported the development of an online ‘one-stop’ shop that provides access to relevant government departmental and local council information. The submissions to the Issues Paper argued that a single point of information provides both parties with a reasonable opportunity to meet required deadlines and provides an avenue for unsophisticated buyers to better understand the additional information that is of value to them. This could be achieved with the development of a single property information gateway for access to all government information, ideally with all information collated and summarised in a single report form.

The Queensland Competition Authority (QCA) considered the possibility of a ‘one-stop shop’ as a mechanism to eliminate duplication. The QCA indicated that a reduction or elimination of duplication would eliminate burden without eliminating regulatory effect.¹⁰⁷ Further investigation of whether it is possible to better use technology to enable a greater coordination and potentially, single search portal for government information should be undertaken.¹⁰⁸

¹⁰⁶ *Body Corporate and Community Management Act 1997* (Qld) s 223.

¹⁰⁷ Queensland Competition Authority, *Measuring and Reducing the Burden of Regulation Final Report* (2013), 53-54.

¹⁰⁸ Queensland Competition Authority, *Measuring and Reducing the Burden of Regulation Final Report* (2013), 54.

Resources

Articles/Books/Reports

Australian Government, *Financial System Inquiry Interim Report* (2014)

Christensen, S, W D Duncan and Amanda Stickley, 'Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap between Existing Laws and Calls for Future Reforms' (2009) 9 *Queensland University of Technology Law Journal* 251

Christensen, S, W D Duncan and Amanda Stickley, 'Evaluating Information Disclosure to Buyers of Real Estate – Useful or Merely Adding to the Confusion and Expense?' (2007) 7 *Queensland University of Technology Law Journal* 148

Commercial and Property Law Research Centre, *Interim Report: Seller Disclosure in Queensland*, released by the Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0011/474896/interim-report-seller-disclosure-in-queensland.pdf.

Commercial and Property Law Research Centre, *Property Law Review Issues Paper 1: Seller Disclosure in Queensland*, released by the Department of Justice and Attorney-General, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0009/224874/property-law-review-ip1-seller-disclosure.pdf.

Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962* (2012)

Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010)

O'Shea, P *Simplification of Disclosure Regulation for the Consumer Credit Code: Empirical Research and Design Redesign –Final Report* (2010)

Queensland Competition Authority, *Measuring and Reducing the Burden of Regulation Final Report* (2013)

Cases

Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112

Butcher v Lachlan Elder Realty (2004) 218 CLR 592

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31

Dormer v Solo Investments Pty Ltd [1974] 1 NSWLR 428

Hinton v Commissioner for Fair Trading [2006] NSWADT 257

Mirvac Queensland Pty Ltd v Wilson [2010] QCA 322

Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd (2005) 215 ALR 625

Legislation

Australian Capital Territory

Civil Law (Sale of Residential Property) Act 2003 (ACT)

Civil Law (Sale of Residential Property) Regulation 2004 (ACT)

New South Wales

Conveyancing Act 1919 (NSW)

Conveyancing (Sale of Land) Regulation 2010 (NSW)

Environmental Planning and Assessment Act 1979 (NSW)

Queensland

Body Corporate and Community Management Act 1997 (Qld)

Building Act 1975 (Qld)

Building Units and Group Titles Act 1980 (Qld)

Coastal Protection and Management Act 1995 (Qld)

Court and Civil Legislation Amendment Bill 2017 (Qld)

Environmental Protection Act 1994 (Qld)

Fire and Emergency Service Act 1990 (Qld)

Land Sales Act 1984 (Qld)

Land Title Act 1994 (Qld)

Local Government Act 2009 (Qld)

Mineral and Energy Resources (Common Provision) Act 2014 (Qld)

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)

Property Agents and Motor Dealers Act 2000 (Qld)

Property Law Act 1974 (Qld)

Property Occupations Act 2014 (Qld)

Property Occupations Regulation 2014 (Qld)

Queensland Building and Construction Commission Act 1991 (Qld)

Retail Shop Leases Act 1994 (Qld)

South Australia

Land and Business (Sale and Conveyancing) Act 1994 (SA)

Tasmania

Property Agents and Land Transactions Act 2005 (Tas)

Victoria

Sale of Land Act 1962 (Vic)

Sale of Land Amendment Act 2014 (Vic)

Sale of Land Amendment Bill 2014 (Vic)

Sale of Land Regulations 2005 (Vic)

Other

Ashton, Heath and Alicia Wood, 'Calls for Building Inspectors to be licensed', *Sydney Morning Herald* (online), accessed 20 Jan 2017 <https://www.domain.com.au/news/calls-for-building-inspectors-to-be-licensed-20110813-1irxy/>

Explanatory Memorandum, Sale of Land Amendment Bill 2014 (Vic)

Gold Coast City Council Local Law No 17 (Maintenance of Works in Waterway Areas) 2013

Appendix A – Seller Statement to Buyer

This statement must be given to a buyer prior to the buyer signing the contract

This statement does not include information about:

- Flooding history
- Structural soundness of the building or pest infestation
- Current or historical use of the property
- Current or past building approvals for the property
- Limits imposed by planning laws on the use of the land
- Services that are or may be connected to the property

You are encouraged to make your own inquiries about these matters prior to signing a contract. You may not be able to terminate the contract if these matters are discovered after you sign.

SELLER:

PROPERTY:

Address:

Lot on plan:

The Seller gives the following prescribed certificates related to the Property with this statement:

	N/A	Yes
Current title search (required)		
Registered Plan (required)		
Current rates notice and water notice (required)		
Notice under s 408 Environmental Planning Act 1994		
Tree order		
Tree Application		
Pool certificate		
Pool certificate (shared pool)		
Notice of No Pool Certificate		
Notice under s 47 <i>Queensland Building and Construction Commission Act 1991</i>		
Exclusive use plan (community title only)		
Body Corporate Certificate (community title only)		

Title

Current title search and copy of the registered plan for the property are given with this statement.

To the seller's knowledge there are no unregistered or statutory easements, covenants or encumbrances affecting the property that will not be released at settlement other than those disclosed with this statement.

[insert space for disclosure: eg land access agreements, conduct and compensation agreements or opt out agreements, high density easements, short lease, statutory drainage easements]

If the property is part of a community title scheme it may be subject to and have the benefit of statutory easements under the Land Title Act 1994, which are not required to be disclosed.

Use of land

The land is located within a [describe] zone.¹⁰⁹

No warranty is given that the use of the land is legal. Further information about land use, transport, sewerage and drainage infrastructure, vegetation and flooding may be available from the local government or from the Queensland Globe.

The seller states:

- *The land is not recorded on the Environmental Management Register or Contaminated Land Register unless a notice under s 408 Environmental Planning Act 1994 is given by the seller.*
- *There are no tree orders or applications under the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 affecting the property other than those given with this statement.*

Building and Structures

If there is a pool on the land a pool certificate or Notice of No Pool Certificate is given with this statement.

If there is a shared pool a copy of the pool certificate is given with this statement.

If the seller is a corporation and the property is a commercial office of more than 1000m² a Building Energy Efficiency Certificate for the building is registered on the Building Energy Efficiency Register.

The seller states:

- *no building work has been carried out by an unlicensed person in the last six years unless a notice under s 47 Queensland Building and Construction Commission Act 1991 is given with this statement.*

¹⁰⁹ A description of the zone can be obtained from the local government or Queensland Globe.

No warranties are given about the structural soundness of the buildings or improvements on the property. It is recommended that a buyer engage a licensed building inspector to inspect the building and provide a report.

Rates, Taxes and Notices

The current rates notice and water notice for the property are given with this statement.

To the seller’s knowledge there are no orders, notices or transport infrastructure proposals affecting the land issued by a State or local government or other relevant authority that may affect the title to or use of the land after settlement, except as disclosed in this statement.

[insert details of notice eg. tidal works notice, notice to clear noxious weeds or repair drains, notice to resume, proposals for transport infrastructure affecting land]

Community Title

If the property is a lot in a community titles scheme, the seller gives with this statement:

- the registered plan and any exclusive use plan for the lot; and
- a body corporate certificate.

The property is part of a community title scheme. If you purchase the property, you will become a member of the body corporate and you will be required to pay levies and comply with the bylaws.

.....

Signature of Seller or authorised agent

[date]

.....

Signature of Buyer

By signing this statement the Buyer acknowledges receipt of this statement prior to signing any contract of sale for the Property

NOTES

1. The list of prescribed certificates on page 1 may be optional but provides a quick reference of the documents the buyer will receive. This may be more important if the seller statement is provided electronically.
2. The consent by the buyer to electronic delivery of the statement is removed on the basis the Act will specifically authorise electronic delivery and signing of the statement by the seller and buyer.

Appendix B – Body Corporate Certificate

This statement contains important financial and other information about the operation of the body corporate and your responsibilities as a lot owner.

You are entitled to rely upon the accuracy of this statement in relation to the financial information.

To obtain all information about the lot and affairs of the body corporate you should search the full records of the body corporate held by the person nominated in this certificate.

Property

Name of Scheme:			
Name of current lot owner:			
Property Address			
Lot on plan		Plan format	<ul style="list-style-type: none"> • Standard • Building • Volumetric

Scheme

CMS number			
Registered address of body corporate for service			
Regulation Module			
Name of person responsible for keeping body corporate records	Secretary, Body Corporate Manager or Other		
	Name:		
	Address:		
	Phone:		
	Email:		

Financial Information

All lot owners are required to pay levies to the body corporate each year.

The proportion of the levies payable by each lot owner depends on the relative contribution schedule lot entitlement for the lot.

The levies payable by the lot owner for the current financial year of X to X appear below.

The levies payable may change in each financial year depending on the expenses of the body corporate.

NOT GOVERNMENT POLICY

Contribution Schedule lot entitlement	[insert]
Levies payable by lot owner on basis of contribution schedule lot entitlements for	
Administrative fund levies \$ (per year)	
[Details of levies paid, due date, discount, date of notice]	
Sinking Fund levies \$ (per year)	
[Details of levies paid, due date, discount, date of notice]	

Some levies are payable on the basis of the interest schedule lot entitlement which may be different to the contribution schedule lot entitlement.

Interest Schedule lot entitlement:	[insert]
Levies payable by lot owner on basis of interest schedule lot entitlements	
Building Insurance	

Other amounts may be payable by the lot owner to the body corporate. If you purchase the lot you will also be liable to pay these amounts.

Other amounts payable to the body corporate by the lot owner:	
• Service agreements:	\$ [details for financial year]
• Exclusive use by-law:	\$
• Electricity agreements and gas:	\$
• Other:	\$
Is there a current special levy for this year?	\$
	Issued on: Instalment/s due date:

Summary of amounts due but not paid

If you purchase the lot you will be responsible for these amounts if not paid by the seller prior to settlement. You should seek legal advice about these amounts as part of the purchase.

Outstanding body corporate debts currently owed by the owner of the lot:
<ul style="list-style-type: none"> • Levies
<ul style="list-style-type: none"> • Penalties
<ul style="list-style-type: none"> • Other amounts (for example recovery costs)

Two Lot Scheme

If the scheme is a Specified Two Lot Scheme:

Is there a separate body corporate bank account: Yes No

A copy of the Lot Owner Agreement is attached/ not attached.

Common Property and Body Corporate Assets

The body corporate is responsible for managing and maintaining the common property and body corporate assets for the scheme.

All lot owners are members of the body corporate and must contribute according to contribution schedule lot entitlements to maintenance, repair and replacement of common property and body corporate assets.

The body corporate is required to establish a sinking fund to pay for future replacement and major repairs of common property and assets.

If the sinking fund is inadequate the lot owners at the time a replacement or repair is necessary will be liable to pay.

Sinking fund balance as at [date of last AGM]

Amount required by Sinking Fund Forecast as at [date of last AGM]

The amount held by the body corporate in the sinking fund as compared to the amount required by the 10 year Sinking Fund Forecast as at the last Annual General Meeting is stated above. Expenditure may have occurred since that date. You can find this information by searching the body corporate records.

Warning: If there is a significant difference between these amounts you should make further inquiries of the body corporate and seek advice from a solicitor prior to signing a contract to purchase a lot in the scheme.

Common property

If there is a shared pool for the scheme a copy of the pool safety certificate is given with this certificate.

The common property for the scheme is all parts of the building and the land not included in the lot. In a building format lot this will include the outside of the building, windows, doors and sometimes balconies.

Exclusive use areas

- a. *A lot owner may be entitled to exclusive use of part of the common property, for example, a courtyard, car park or storage area.*
- b. *Exclusive use must be approved by a resolution of the body corporate. You should ask your solicitor to confirm the exclusive use area was properly approved by the body corporate.*
- c. *If the lot has the benefit of an exclusive use area the lot owner will usually be required to maintain the area and pay for any repairs.*

Body corporate assets

A copy of the body corporate assets register maintained by the body corporate is given with this certificate.

Lot owner improvements to common property

A copy of the register of approved improvements for the scheme is given with this certificate.

A lot owner may be responsible for maintaining improvements which are for the benefit of the lot but located on common property. These improvements may or may not be within an exclusive use area.

Body corporate insurance

The body corporate for the scheme must insure the common property and body corporate assets for full replacement value. The body corporate must also have public risk insurance covering the common property and body corporate assets.

The building insurance a body corporate must have is affected by the type of survey plan for the scheme.

Lot owner insurance

The lot owner is responsible for insuring the contents of the lot and any public liability risks which might occur within the lot and if the building is detached or freestanding, may be responsible for insuring the building. More information is available from the Queensland Government website.

Details of current policies of insurance held by the body corporate for damage to the building and public liability are given with this certificate.

If no current body corporate insurance policy for property damage and public liability is attached you should seek legal advice prior to signing the contract.

By-laws

By-laws for the Scheme regulate the responsibilities and conduct of lot owners and occupiers in the scheme.

If you buy a lot in the scheme you will be bound to comply with the by-laws.

The bylaws may contain rules about:

- *Smoking;*
- *Whether restrictions on keeping pets;*
- *Noise on the lot and parties;*
- *Parking on lots and common property; and*

NOT GOVERNMENT POLICY

- *Rights and restrictions about lot owners' use of common property or exclusive use areas.*

The by-laws are part of the Community Management Statement for the Scheme.

Your solicitor can obtain a copy of the by-laws and Community Management Statement for you.

BODY CORPORATE AUTHORITY

This certificate is signed and given under the authority of the Body Corporate.

Name:

Office held:

Signature:

Date:

Appendix C – Submissions to the Issues Paper and Interim Report

Submissions to *Property Law Review Issues Paper 1: Seller Disclosure in Queensland*

- Queensland Law Society;
- Property Council of Australia;
- Real Estate Institute Queensland;
- Urban Development Institute of Australia (Queensland);
- Spatial Industries Business Association Limited (Queensland); and
- Robinson & Robinson Lawyers.

Submissions to *Interim Report: Seller Disclosure in Queensland*

- Queensland Law Society;
- Real Estate Institute Queensland;
- Strata Community Australia;
- Office of the Commissioner for Body Corporate and Community Management;
- Tim O’Dwyer – Mitchells Solicitors;
- Rhys Rogers – Before you Bid.com.au;
- Patricia Mackie-Smith – Building Pro Building & Pest Reports;
- Calle Palmer
- Don Jender
- Ben Anderson; and
- David Campbell.