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Queensland Government  
Property Law Review  
Issues Paper 1  
*Seller Disclosure in Queensland*

Commercial and Property Law

Research Centre

QUT Law

# Review of seller disclosure obligations in Queensland

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## Attorney-General's foreword



The Queensland Government knows that property and construction are critical to Queensland's future economic growth and prosperity.

On 15 August 2013, I announced that the Government had engaged the Queensland University of Technology (QUT) to conduct a broad ranging, independent review of Queensland's property laws, including community titles legislation.

The Government is proud to partner QUT in this exciting opportunity to identify ways of ensuring Queensland legislation provides the foundation for strong, sustainable and socially responsible growth in Queensland's property and construction sectors.

The property law review is being conducted through the Commercial and Property Law Research Centre, QUT Law, and is headed by highly-respected property law experts, Professor Bill Duncan, Professor Sharon Christensen and Dr Bill Dixon.

A critical part of the property law review process will be meaningful consultation and engagement with Queensland property professionals, industry stakeholders and the broader community.

Accordingly, I am very pleased to be releasing the first two issues papers for the property law review. Issues Paper 1 (this Issues Paper) considers the current seller disclosure regime in Queensland including its effectiveness for the purposes of the sale and conveyancing process and whether there is a need for reform. Issues Paper 2 deals with the complex and difficult issues concerning the setting and adjustment of contribution schedule lot entitlements under the *Body Corporate and Community Management Act 1997*.

Two further Issues Papers will be released for consultation in the second half of 2014. Issues Paper 3 will seek industry and community feedback on issues concerning the *Property Law Act 1974*, while Issues Paper 4 will be about body corporate governance issues arising under

the *Body Corporate and Community Management Act 1997* and other community titles legislation.

Due to the complexity of the review, QUT will provide the Government with reports outlining the findings of the review in stages, commencing with reports about seller disclosure and body corporate lot entitlements in mid-2014. The Government will make announcements about the outcomes of the property law review after considering the findings and recommendations of the QUT review team.

I sincerely thank the QUT review team for preparing the first two Issues Papers for the property law review. I am confident that these papers provide an excellent starting point for engaging with property professionals, industry and the community about the critical issues that need to be addressed if Queensland is to have a contemporary, world-class property law framework for the future.

I strongly encourage all Queenslanders with an interest in property and community titles law to have their say by making a submission in response to the Issues Papers.

**The Honourable Jarrod Bleijie MP**  
**Attorney-General and Minister for Justice**  
12 February 2014

**Not Government Policy**

## How to make a submission

Written submissions are invited in response to some or all of the issues raised in this Issues Paper.

The issues raised are not intended to be exhaustive. If you think there are other opportunities for improving the seller disclosure regime under Queensland property laws, please include these in your response.

The closing date for submissions is 21 March 2014.

### ***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](mailto: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 provided to the Commercial and Property Law Research Centre, QUT Law which is conducting the review.

### ***Privacy statement***

Any personal information you include in your submission will be collected by the Department of Justice and Attorney-General (the Department) and the Queensland University of Technology for the purpose of undertaking the review of Queensland's property laws. The Department or the Queensland University of Technology 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 and the Queensland University of Technology 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.

## Disclaimer

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## Executive Summary

This Issues Paper considers the current seller disclosure regime in Queensland including its effectiveness for the purposes of the sale and conveyancing process and whether there is a need for reform.

The paper highlights the wide ranging disclosure obligations in Queensland and the disparate sources of these requirements (common law, contract, statutory and local government laws). The paper considers the seller disclosure obligations in other jurisdictions that have enacted statutory disclosure regimes. Analysis has been undertaken of these statutory regimes and the Queensland system to provide a comparison of the key features of each relevant jurisdiction including the category of land the obligations apply to, the timing of disclosure, the form of disclosure, the content of the disclosure (what must be disclosed) and remedies available for failure to comply with the obligations. It is clear from this analysis that Queensland's seller disclosure system is complicated, cumbersome and without any guiding principles underpinning its development.

A primary purpose of this paper is to seek feedback from stakeholders, including agents, sellers, buyers and legal representatives, and other interested parties in response to the specific questions set out in the paper. One of the reasons for seeking this information is to obtain evidence (both qualitative and quantitative) about the concerns, challenges and any difficulties experienced by stakeholders arising from the current Queensland disclosure regime and to obtain comments about the guiding principles suggested in the paper in Part 5.1 to be used as a possible benchmark for any seller disclosure regime. This information will then be used to assess whether reform is necessary and will feed into any subsequent discussion or option papers on this issue.

## 1. Background

### 1.1. Review of Queensland Property Laws

The Queensland Government has engaged the Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology (**QUT**) to conduct an independent and broad-ranging review of Queensland's property laws. This review will pave the way for a more streamlined approach to how Queenslanders buy, sell and manage property by reducing red tape, unnecessary regulation and property law duplication. A core element of the review will be the options for the modernisation, simplification, clarification or reform of the *Property Law Act 1974* (Qld) in light of case law, the operation of other related legislation and changes in practice. The review will address the options for the regulation of the setting, adjustment and review of lot entitlements and consider ways to improve the framework regulating the governance of community titles schemes under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**).

This Issues Paper will investigate whether the current seller disclosure regime in Queensland contributes to an effective sale and conveyancing process or whether there is scope for it to be simplified, improved and any red tape reduced. An Options Paper on this issue will be completed following analysis of the feedback received during the consultation in relation to this Issues Paper.

### 1.2. Context and Rationale for Review of Seller Disclosure

Review of the seller disclosure regime in Queensland forms part of the Government's agenda to modernise property law with the objective of achieving a more streamlined and common sense approach to the sale and purchase of property.<sup>1</sup> A key component of this policy agenda is to reduce 'red tape' and unnecessary regulation of the conveyancing process in order to better facilitate the conduct of business in Queensland and to reduce transaction costs associated with the sale process.<sup>2</sup> This is consistent with the Government's broader agenda to reduce the burden of regulation in Queensland by 20% over 6 years which commenced in March 2012.<sup>3</sup> As part of this process the Office of Best Practice Regulation has recently reported on a proposed framework for measuring and reducing the regulatory burden in Queensland and identified land sales and property development regulations that impose a significant red tape burden as a 'fast track' reform area.<sup>4</sup>

The review is timely for a number of reasons. Firstly, disclosure obligations imposed on sellers in Queensland derive from a complex mix of common law, statutory provisions and contract. The introduction of local disclosure obligations may potentially increase this complexity. Consider, for example the recent introduction of the *Gold Coast City Council Local Law No. 17 (Maintenance of*

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<sup>1</sup> Attorney-General and Minister for Justice (Qld), 'Review Modernises Queensland Property Law' (Media Release, 15 August 2013) and Queensland, *Parliamentary Debates*, Legislative Assembly, 27 November 2012, 2759 (AP Cripps) on the First Reading of the *Electronic Conveyancing National Law (Queensland) Bill 2012*.

<sup>2</sup> Queensland, *Parliamentary Debates*, above n 1.

<sup>3</sup> Office of Best Practice Regulation, *Measuring and Reducing the Burden of Regulation*, Final Report (2013) ix; Queensland Treasury and Trade, *Report Card on Red Tape Reduction* (2013).

<sup>4</sup> Office of Best Practice Regulation, above n 3, 43; Queensland Treasury and Trade, above n 3.

*Works in Waterway Areas) 2013*<sup>5</sup> (**GCCC Local Law**). The GCCC Local Law applies to a variety of waterways in the Gold Coast local government area, including canals, and imposes an obligation on responsible persons (which can include property owners) to maintain revetment walls and other marine structures. Sellers of property that may be affected by the law are required to ensure that the contract of sale for their property includes a term containing matters specified in the local law. There is a risk that other disclosure obligations may be imposed by local councils in other parts of Queensland in the future. The potential for additional layers of obligations to be added to existing rules highlights the complexity within the current disclosure regime and raises issues associated with the transparency and clarity of a seller's disclosure obligations in Queensland. Some of these issues include:

- There is no single legislative or common law source governing seller disclosure obligations in Queensland;
- It is potentially difficult for sellers and/or their solicitors to identify these obligations, and this identification may become even more difficult with the introduction of obligations at a local government level. This raises the risk of errors and omissions occurring during the conveyancing process with implications for the professional indemnity insurance scheme for solicitors in Queensland;
- There is no coordinated and principled approach to the review, amendment or introduction of new disclosure obligations in statutes or contract;
- The REIQ standard form contracts which are commonly used in conveyancing in Queensland are revised and amended in response to changes in the law and judicial decisions impacting upon conveyancing practice and interpretation of the contract, but current versions of the REIQ contract are not always used in transactions. This creates confusion in the market place with different versions in circulation and results in some buyers being denied the same information and rights as other buyers;
- The terms of the REIQ standard contracts (particularly warranties) can be excluded especially by mortgagees exercising a power of sale and receivers and the protections provided by these warranties are lost, often to vulnerable buyers;
- The increasing use of non standard contracts which mimic the REIQ format but exclude important safeguards such as the contractual warranties;
- Buyers receive a variety of different disclosure documents at different stages of the sale process including before contracts are formed, before settlement and at settlement;
- The consequences of failure to disclose information or inaccurate disclosure vary from outright termination to termination on grounds of material prejudice.

Secondly, seller disclosure has not been the subject of any formal review previously in Queensland. This is in contrast to the other Australian jurisdictions that have had statutory disclosure regimes in place for a number of years. A number of these other States and Territories have recently reviewed, or are in the process of reviewing, their existing statutory seller disclosure regimes. The reasons for these reviews are varied, but include:

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<sup>5</sup> Note also the subordinate law, Local Law 17.1 (Works in Non Coastal Waterway Areas) 2013.

- reducing red tape;<sup>6</sup>
- improving the efficiency of the conveyancing process;<sup>7</sup>
- reducing costs associated with the sale of property;<sup>8</sup>
- assessing the effectiveness and suitability of the existing regimes;<sup>9</sup>
- sunset provisions in regulations which contain the details of disclosure obligations.<sup>10</sup>

Thirdly, the conveyancing landscape in Queensland is in the process of modernisation with the commencement of electronic conveyancing following the introduction of the *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld). Although the introduction of the electronic regime will be staged and will not apply to the disclosure of documents, the system is consistent with the Government's overall agenda and is intended to ultimately deliver a more streamlined process and provide efficiencies for consumers and the finance and legal sectors involved in conveyancing.<sup>11</sup> It also reflects the significance of technological change more generally and the need to accommodate these changes in reform processes to facilitate potentially lower cost solutions and to offer up alternative methods of disclosure.<sup>12</sup> Currently, there is no express provision for making offers or disclosure electronically.

Consistent with the overall rationale and terms of reference for the review of property laws in Queensland, this review will investigate whether the current disclosure regime in Queensland contributes to an effective sale and conveyancing process or whether there is scope for it to be simplified, improved and any red tape reduced by considering:

- 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;

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<sup>6</sup> Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962* (2012) and Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962 Options* (2013). The consultation period for the Options Paper closed on 14 June 2013 and submissions received are currently being considered. A key impetus for this review was the Victorian Government's whole of government program to deliver 'red tape' reductions by July 2014.

<sup>7</sup> See for example the NSW Land and Management Authority, *Discussion Paper: Review of Conveyancing (Sale of Land) Regulation 2005* (2010) 2. Although the Review was initiated as a result of sunset provisions automatically repealing the 2005 regulations, the Review's primary focus was to investigate and make recommendations for change to simplify and increase the speed and efficiency of the New South Wales conveyancing process.

<sup>8</sup> The Northern Territory recently repealed its seller disclosure legislation, *Sale of Land (Rights and Duties of Parties) Act 2010*. A number of the concerns with the legislation appear to be related to costs ramifications of the disclosure process: see Northern Territory, *Parliamentary Debates, Assembly*, 28 March 2013, (Mr Elferink) on the second reading of the *Sale of Land (Rights and Duties of Parties) Act Repeal Act Bill 2013*.

<sup>9</sup> See for example the recent consideration of Part 10 of the *Property Agents and Land Transactions Act 2005* (Tas) where concerns about the suitability of Part 10 were raised following the release of regulations to give effect to that Part. The Tasmanian Government has introduced into the House of Assembly in April 2013 the *Residential Property Transactions Bill 2013* (Tas) which repeals Part 10 and sets up an alternative seller disclosure framework in Tasmania.

<sup>10</sup> NSW Land and Management Authority, above n 7.

<sup>11</sup> Queensland, *Parliamentary Debates, Legislative Assembly*, 18 April 2013, 1150 (AP Cripps) on the Second Reading of the *Electronic Conveyancing National Law (Queensland) Bill 2012*.

<sup>12</sup> Office of Best Practice Regulation, above n 3, 2 and Queensland Treasury and Trade, above n 3.

- the extent to which the current regime balances the information cost between buyer and seller (including any duplication of searches undertaken).

## 2. The current seller disclosure regime in Queensland

Although there is no formal seller disclosure regime in Queensland, sellers are required to disclose certain information in order to comply with their common law, statutory and contractual obligations. These obligations are discussed in further detail below.

### 2.1. Common Law

A seller's disclosure obligations at common law are generally quite limited. A number of general principles regarding the seller's obligations can be summarised as follows:

- Only latent defects in the seller's title need to be disclosed by the seller<sup>13</sup> (for example, interests registered on the title such as encumbrances, leases and easements).<sup>14</sup> Defects that are likely to be discovered by a buyer exercising reasonable care when inspecting the property (patent defects in title) are not required to be disclosed by the seller;
- A seller is not required to disclose defects in the quality of title.<sup>15</sup> These kinds of defects affect the enjoyment or use of the land, rather than impacting on the title to the land.<sup>16</sup> Examples of defects in quality of title include restrictions on the use or development of the land or contamination issues;
- A seller provides no warranty as to the fitness of the property for the purpose for which it is purchased.<sup>17</sup> As a consequence, many buyers now undertake a building inspection of the property and make the contract subject to a satisfactory report.

The common law position in Queensland has clearly been altered by the statutory and contractual arrangements in place in relation to property transactions.

### 2.2. Statutory obligations

A seller of property in Queensland may be required to disclose information under twelve different Acts and statutory instruments, to the extent that these apply to the relevant transaction. These Acts include:

- *Environmental Protection Act 1994* (Qld);

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<sup>13</sup> Latent defects are those that cannot be discovered by a buyer exercising reasonable care when physically inspecting the property. These can be compared to patent defects which are those defects that are likely to be discovered by a buyer exercising reasonable care when inspecting the property: S A Christensen, W M Dixon, W D Duncan and S E Jones, *Land Contracts in Queensland* (The Federation Press, 3<sup>rd</sup> ed, 2011), 84.

<sup>14</sup> Sharon 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, 156.

<sup>15</sup> Christensen et al, above n 13, 85-86; Christensen et al, above n 14, 156.

<sup>16</sup> A buyer will only have redress for these types of defects where the seller has warranted that the property is free of defects in quality of title, fraudulent concealment of the defect by the seller or there has been misrepresentation by the seller in relation to the defect: Christensen et al, above n 13, 85; Christensen et al, above n 14, 156.

<sup>17</sup> Christensen et al, above n 14, 156.

- *Land Sales Act 1984* (Qld);
- *Queensland Building and Construction Commission Act 1991* (Qld);
- *Electrical Safety Regulation 2002* (Qld);
- *Fire and Rescue Service Act 1990* (Qld);
- *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld);<sup>18</sup>
- *Sustainable Planning Act 2009* (Qld);
- *Building Act 1975* (Qld);
- *Coastal Protection and Management Act 1995* (Qld).

Additional disclosure obligations apply under the BCCM Act if the property is part of a community titles scheme.

In the case of commercial property, there are additional disclosure obligations under the following Acts:

- *Building Energy Efficiency Disclosure Act 2010* (Cth);
- *Work Health and Safety Act 2011* (Qld) and *Work Health and Safety Regulations 2011* (Qld).

Annexure 1 sets out in detail the disclosure obligations imposed on a seller by Queensland legislation.<sup>19</sup>

As discussed above, there may be additional disclosure obligations imposed by local councils that only apply to sellers within a specific local government area. The GCCC Local Law is an example of a localised disclosure obligation which requires the inclusion of an additional clause in the sale contract in certain circumstances. This adds a further level of inquiry and compliance to the sale process.

### 2.3. Contractual obligations

There are currently a number of standard form Real Estate Institute Queensland (**REIQ**) contracts used in Queensland for the sale of:

- Houses and Residential Land;
- Residential Lots in a Community Titles Scheme;
- Commercial Land and Buildings.<sup>20</sup>

These contracts are the result of collaboration and agreement between the Queensland Law Society and the REIQ. Sellers are not obligated to use these standard form contracts, but the general conveyancing practice in Queensland, particularly in relation to residential houses, land and existing lots in community titles Schemes is to use these contracts.

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<sup>18</sup> This regulation will be replaced by the *Electrical Safety Regulation 2013* (Qld) from 1 January 2014.

<sup>19</sup> The *Property Agents and Motor Dealers Act 2000* (Qld) currently imposes certain disclosure obligations on real estate agents under ss 149-151, solicitors (s 366), auctioneers (s 266) and pastoral houses (s 188). The Property Occupations Bill 2013 will remove a number of these disclosure obligations. This paper does not consider these disclosure obligations.

<sup>20</sup> There is also an REIQ contract for Commercial Lots in a Community Titles Scheme which is not up to date and is also not widely used. This contract will not be considered for the purposes of this Issues Paper.

The disclosure requirements under the contracts are contained in seller statements, warranties and express seller disclosure provisions, most of which have accompanying termination rights in favour of the buyer in the case of non-compliance. A brief overview of some of the key requirements is below. Annexure 2 sets out in more detail the seller disclosure obligations under the REIQ Contracts for Houses and Land and Residential Lots in a Community Titles Scheme.

### 2.3.1. Title Encumbrances

A seller is required to disclose to the buyer all the title encumbrances as set out in the Reference Schedule of the REIQ contract. These include interests such as leases, unregistered statutory charges, mortgages, covenants and easements.

### 2.3.2. Warranties

There are a number of seller warranties set out in the REIQ contracts. The warranties do not expressly impose disclosure obligations on sellers however, a seller should make a disclosure if they are not able to provide the relevant warranty to avoid the possibility of contractual termination. Some of the warranties relate to the:

- capacity of the seller to transfer the title in the land free of interests and encumbrances;
- absence of any judgement, order or writ that may affect the land (or threatened proceedings that may lead to the same);
- absence of facts or circumstances that may lead to the land being classified as contaminated under the *Environmental Protection Act 1994* (Qld).

There are additional warranties under the REIQ Contract for Residential Lots in a Community Titles Scheme that relate to the community titles scheme, body corporate assets and community management statement. For example:

- that there is no proposal to record a new community management statement for the scheme and there has been no notice of a meeting of the body corporate to be held after the contract date;
- all body corporate consents to improvements made to common property and which benefit the lot or the registered owner of the lot are in force;<sup>21</sup>
- the community management statement recorded for the scheme contains details of all allocations that affect the lot or the registered owner of the lot.<sup>22</sup>

### 2.3.3. Other disclosure obligations

A seller is required to disclose:

- any valid notice or order by a competent authority or court requiring work to be done or money to be spent in relation to the property if issued before the contract date;
- whether the present use of the land is lawful;

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<sup>21</sup> REIQ Contract for Residential Lots in a Community Titles Scheme (5<sup>th</sup> ed) cl 7.4(3)(c).

<sup>22</sup> REIQ Contract for Residential Lots in a Community Titles Scheme (5<sup>th</sup> ed) cl 7.4(3)(d).



- if the land is affected by a transport proposal;
- whether any resumption notice has been issued;
- whether property is affected by the *Queensland Heritage Act 1992* or is included in the World Heritage List.

#### **2.3.4. Additional obligations for residential lots in a community title scheme**

In the case of the sale of a residential lot in a community titles scheme, the seller is also required to give the buyer a copy of any notice it receives of a proposed meeting of the body corporate to be held after the contract date and resolutions passed at that meeting prior to settlement.<sup>23</sup>

#### **Questions**

- 1. Are existing seller disclosure obligations in Queensland easily identifiable to both sellers and buyers and their relevant representatives?**
- 2. If seller disclosure obligations are not easily identified, why do you think this is the case? What issues are there in identifying and locating the obligations?**
- 3. How well do you think the current system of seller disclosure works in Queensland? Are you aware of any limitations or problems with the current seller disclosure regime in Queensland?**
- 4. Do you have any concerns about the current disclosure system in Queensland?**
- 5. Can you identify any specific problems you have encountered in relation to the operation of the current framework?**
- 6. Do you think the current system assists a buyer to be better informed when purchasing a property in Queensland? If not, what information is not disclosed prior to contract that a buyer would find useful when buying a property?**
- 7. Do you think the different sources (contract, various Acts and common law) of the seller disclosure obligations create any practical difficulties?**

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<sup>23</sup> REIQ Contract for Residential Lots in a Community Titles Scheme (5<sup>th</sup> ed) cl 8.4(1).

### 3. Comparison of Queensland disclosure obligations with seller disclosure in other jurisdictions

Other States and Territories in Australia, apart from the Northern Territory and Western Australia, have formal seller disclosure frameworks set out in legislation. A common theme underpinning these regimes is to address the potential asymmetry of information between the buyer and seller. It is clear from the overview of the particular Acts and instruments in each State and Territory where a statutory system has been adopted that there is an absence of uniformity in, amongst other things, the manner in which seller disclosure legislation has developed and the form and timing of the disclosure required.<sup>24</sup> The limited number of common features include:

- requiring the disclosure of information relating to both defects in title and defects in quality of title;<sup>25</sup>
- the availability of remedies in some form (usually rescission) where disclosure obligations are not complied with or warranties are breached.

In the case of the Northern Territory, its statutory disclosure regime which was introduced in 2012 was repealed in July 2013.<sup>26</sup> In Tasmania, although Part 10 of the *Property Agents and Land Transactions Act 2005* (Tas) sets out the framework for a disclosure regime, that Part has never commenced and is unlikely to do so. The Residential Transactions Bill 2013 (Tas) was introduced into the Tasmanian Parliament in April 2013 and, if passed, will repeal Part 10 and establish a different disclosure regime.<sup>27</sup> Western Australia, like Queensland at present, relies on the common law, contract and some statutory obligations in the case of community titles.

These other jurisdictions provide a useful point of comparison with the Queensland system and an illustration of the different options for potentially streamlining and simplifying seller disclosure.

The section below discusses the different components of a seller disclosure framework from a Queensland perspective and then considers how the other jurisdictions approach the same component.

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<sup>24</sup> Christensen et al, above n 14, 149.

<sup>25</sup> Defects in title include leases, mortgages, statutory charges and impact on the tenure of the property to be sold: Christensen et al, above n 13, 85. Defects in quality of title are those defects that impact on the use and enjoyment of a property such as termite infestation or flood-prone land. They do not affect the 'good' title of the property.

<sup>26</sup> The *Sale of Land (Rights and Duties of Parties) Act 2010* (NT) commenced on 31 October 2012. However, the Act was repealed on 17 July 2013 by the *Sale of Land (Rights and Duties of Parties) Act Repeal Act 2013* (NT).

<sup>27</sup> This Issues Paper will only refer to the disclosure regime as proposed in the Residential Property Transactions Bill 2013 (Tas).

## 3.1. What land or property is subject to the obligations of disclosure?

### 3.1.1. Queensland

In Queensland, the property which is the subject of disclosure obligations is described and defined differently depending on the contract which is used or the particular Act which may apply to the transaction. The standard form REIQ contracts apply to:

- Houses and residential land;
- Residential lots in a community titles scheme;
- Commercial land and buildings.

In the case of legislation, a summary of the type of land to which the obligations relate is set out below.

- Land, place or business;<sup>28</sup>
- Lot;<sup>29</sup>
- Land affected by an application or order;<sup>30</sup>
- Land or works subject to specified notices;<sup>31</sup>
- Unregistered land;<sup>32</sup>
- Residential land on which a domestic residence is constructed.<sup>33</sup>

In the case of both residential and commercial community title, the obligations relate to:

- existing lots; and
- proposed lots.<sup>34</sup>

Other disclosure obligations only apply to the following property:

- Relinquishing management or control of a 'workplace';<sup>35</sup> and

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<sup>28</sup> See the *Environmental Protection Act 1994* (Qld) sch 4 where 'land' is defined to include the airspace above land, or land that is at any time, covered by waters. The term 'place' is defined to mean premises, another place on land or a vehicle: *Environmental Protection Act 1994* (Qld) s 363F.

<sup>29</sup> This is the term used in the *Sustainable Planning Act 2009* (Qld) and the *Gold Coast City Council Local Law No. 17 (Maintenance of Works in Waterway Areas) 2013 (GCCC Local Law)*. The meaning of the word 'lot' in the GCCC Local Law is defined in the same way as under s 10 of in the *Sustainable Planning Act 2009* (Qld) and includes a lot under the *Land Title Act 1994* (Qld) or common property for a community titles scheme under the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**), a lot or common property to which the *Building Units and Group Titles Act 1980* continues to apply.

<sup>30</sup> Land affected by an application or order means land on which a tree the subject of an application or order is situated: *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 82.

<sup>31</sup> 'Land' includes land that is or is at any time covered by Queensland waters: *Coastal Protection and Management Act 1995* (Qld) sch.

<sup>32</sup> *Land Sales Act 1984* (Qld).

<sup>33</sup> *Electrical Safety Regulation 2002* (Qld) (which will soon be replaced by the *Electrical Safety Regulation 2013* (Qld) on 1 January 2014) and *Fire and Rescue Service Act 1990* (Qld).

<sup>34</sup> BCCM Act ss 206 and 213.

- The sale of a non-strata building where corporations are parties and the building has office space.<sup>36</sup>

### 3.1.2. Other Australian statutory disclosure regimes

The Australian jurisdictions that have in place a statutory disclosure regime use different terminology to describe the land to which the obligations apply. Annexure 3 illustrates the differences. In summary, New South Wales, Victoria and South Australia legislation use the term 'land' which is defined broadly in each jurisdiction and the applicable disclosure regimes apply to strata units and community title property. South Australia is unique in that the statutory disclosure regime also expressly applies to the sale of a small business. The Australian Capital Territory legislation and the proposed Bill in Tasmania use the term 'residential property' and both regimes cover strata scheme property. In the Australian Capital Territory, a separate disclosure regime exists in relation to a lot included in a community title scheme. Although Western Australia does not have a statutory disclosure regime, statutory disclosure obligations do apply in relation to strata scheme lots under the *Strata Titles Act 1985* (WA).

#### Questions

8. **There are a number of categories of property to which disclosure obligations could apply including:**
  - Residential;
  - Small business;
  - Commercial;
  - Rural.
  - (a) **If a seller disclosure regime was introduced in Queensland, do you think any of the categories set out above should be included or excluded from the regime?**
  - (b) **If you think certain categories should be included or excluded, which ones and why?**
9. **Are there other categories of property that you think should be the subject of a seller disclosure regime?**
10. **Do you think different disclosure obligations should apply to different categories of property?**
11. **Should additional disclosure obligations apply to property sold off the plan or community titles property?**

<sup>35</sup> 'Workplace' is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work: *Workplace Health and Safety Act 2011* (Qld) s 8(1) and *Workplace Health and Safety Regulation 2011* (Qld) s 428.

<sup>36</sup> See *Building Energy Efficiency Disclosure Act 2010* (Cth) pts 2 and 5.

## 3.2. Form of disclosure

### 3.2.1. Queensland

There are a number of different ways in which disclosure must be made in Queensland, depending on the source of the relevant obligation. In the case of the standard REIQ sale contracts, a seller makes a number of warranties in the contract which operate at different stages of the sale process. Generally, if a seller is unable to make the relevant warranties, he or she should disclose the information he or she is unable to warrant to reduce the risk of the contract being terminated. There are also statements and documents which the seller is required to provide to the buyer under some of the standard contracts. For example:

- Full details of tenancies;<sup>37</sup>
- Copies of all security interests;<sup>38</sup>
- Copies of any notice of a proposed body corporate meeting to be held and resolutions passed at that meeting;
- Copies of all documents relating to any unregistered interests in the property and up to date copies if previously provided documents cease to be accurate and up to date.<sup>39</sup>

In the case of statutory obligations, again the form of disclosure depends on the particular Act that applies to the sale transaction. An overview of some of the different forms of disclosure is set out below:

- Disclosure statement in the case of an existing or proposed lot;<sup>40</sup>
- Statutory warranties;<sup>41</sup>
- Disclosure plan and statement or copy of the plan of survey for a proposed allotment;<sup>42</sup>
- Written notice of any contaminated land notice;<sup>43</sup>
- Written notice of unlicensed building work in the form prescribed;<sup>44</sup>
- Written notice of electrical safety switches and smoke alarms;<sup>45</sup>
- Copy of an application to QCAT or QCAT order in relation to a tree;<sup>46</sup>
- Pool Safety certificate (approved form);<sup>47</sup>
- Written notice of any undischarged coastal protection notice or tidal works notice;<sup>48</sup>
- Inclusion of a term in the contract of sale compliant with the GCCC Local Law;

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<sup>37</sup> REIQ Contract for Houses and Residential Land (9<sup>th</sup> ed) cl 8.4(2) and REIQ Contract for Residential Lots in a Community Titles Scheme (5<sup>th</sup> ed) cl 8.5(2).

<sup>38</sup> REIQ Contract for Houses and Residential Land (9<sup>th</sup> ed) cl 8.4(3) and REIQ Contract for Residential Lots in a Community Titles Scheme (5<sup>th</sup> ed) cl 8.5(3).

<sup>39</sup> A similar provision is included in the REIQ Contract for Residential Lots in a Community Titles Scheme cl 8.5.

<sup>40</sup> BCCM Act ss 206 and 213.

<sup>41</sup> BCCM Act s 223.

<sup>42</sup> *Land Sales Act 1984* (Qld) s 9.

<sup>43</sup> *Environmental Protection Act 1994* (Qld) s 421.

<sup>44</sup> *Queensland Building and Construction Commission Act 1991*(Qld) s 47.

<sup>45</sup> *Electrical Safety Regulation 2002* (Qld) reg 78 and the *Fire and Rescue Service Act 1990* (Qld) s 104RK.

<sup>46</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld) s 83.

<sup>47</sup> *Building Act 1975* (Qld) ss 246ATM and 246ATF.

<sup>48</sup> *Coastal Protection and Management Act 1995*(Qld) s 65.

- Asbestos register.<sup>49</sup>

### 3.2.2. Other Australian statutory disclosure regimes

Although the form of the disclosure varies between the jurisdictions, the way in which disclosure must occur is clearly set out in the legislation and does not require the seller to look beyond the relevant provisions to identify this. Table 1 below sets out details of the form disclosure takes in each jurisdiction. In summary, South Australia relies primarily on a seller statement, the content of which is prescribed in some detail in the relevant Act and Regulation. There are some documents which need to be attached to the statement, including a prescribed notice which sets out a number of questions directing the buyer’s attention to issues categorised under different headings.<sup>50</sup> The Australian Capital Territory requires sellers to disclose ‘required documents’ which includes, amongst other documents, the sale contract, Crown lease, certificate of title and relevant encumbrances. A number of conditions must be included in the contract of sale, including statutory warranties. In New South Wales, disclosure is through the provision of a number of documents attached to the contract of sale including a section 149 certificate, sewage plan, certificate of title folio and deposited plan. The New South Wales legislation also provides for the inclusion of prescribed conditions and warranties in the contract of sale. In Victoria, a seller is required to give the buyer a statement setting out a variety of matters including details of any mortgage, charge, easement or covenant affecting the land. Various documents are also required to be attached to the statement such as evidence of the seller’s title to the land, a copy of the plan of strata subdivision. Tasmania’s pending disclosure regime is document based and requires a seller to include specified documents as part of the sale contract.<sup>51</sup> Sellers are required to include copies of the title search and plans, local government certificate and in the case of residential lots as part of a strata scheme, a copy of the by-laws and written evidence of the insurance held by the body corporate.

**Table 1 Form of disclosure obligation: seller statement, warranties, implied conditions or documents**

Form of disclosure	NSW	Vic	SA	Tas	ACT	WA
<b>Seller Statement/form</b>	No	Yes <sup>52</sup>	Yes <sup>53</sup>	No <sup>54</sup>	Yes (community title scheme only) <sup>55</sup>	Yes (strata only) <sup>56</sup>

<sup>49</sup> *Work Health and Safety Regulation 2011* (Qld) s 428.

<sup>50</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA), s 13A and the *Land and Business (Sale and Conveyancing) Regulation 2010* (SA) sch 2.

<sup>51</sup> Residential Property Transactions Bill 2013 (Tas) cl 7(1).

<sup>52</sup> *Sale of Land Act 1962* (Vic) s 32(1). Section 32(1A) requires an additional statement to be provided before the purchaser signs the contract in circumstances where the sale of land includes a residence. There is no requirement to provide this extra statement as part of the contract of sale.

<sup>53</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s7(1) and the *Land and Business (Sale and Conveyancing) Regulation 1995* (SA) sch 1.

<sup>54</sup> There is no express requirement to provide a seller statement under the Residential Property Transactions Bill 2013 (Tas). However, pursuant to cl 16 of the Bill, a seller has a right to rescind a sale contract any time prior to completion if the contract for sale includes a residential building and there is any legal restriction at the date on which the contract is made that hinders or prevents the use of the residential property for the

Form of disclosure	NSW	Vic	SA	Tas	ACT	WA
Warranties	Yes <sup>57</sup>	No	No	No	Yes <sup>58</sup>	No
Conditions	Yes <sup>59</sup>	No	No	No	Yes <sup>60</sup>	No
Documents	Yes <sup>61</sup>	Yes <sup>62</sup>	Yes <sup>63</sup>	Yes <sup>64</sup>	Yes <sup>65</sup>	Yes <sup>66</sup>

## Questions

12. Do you think the different forms of disclosure in Queensland, (statement, documents, contractual clauses and warranties), are appropriate given the growing complexity of conveyancing transactions?

13. Do you think the different forms of disclosure in Queensland raise any practical problems?

14. It is clear after looking at the form of disclosure in other jurisdictions that there are a number of options for how disclosure might occur. For example:

**Option 1** – Statutory warranties (with disclosure occurring where a seller is unable to make particular warranties).

(a) Do you think a statutory warranty disclosure regime would work in Queensland?

(b) What do you think might be the advantages or disadvantages of this form of disclosure?

purposes of a dwelling or there are any unapproved works on the residential property. The right to rescind in these circumstances is not available if the sale contract includes, amongst other information, details of the legal restriction or the particular unapproved works: see cl 16(4).

<sup>55</sup> *Community Title Act 2001* (ACT) s 67.

<sup>56</sup> The obligation to provide notifiable information in Western Australia applies only to strata title lots or proposed lots. The requirement can also be complied with by the seller ensuring that the notifiable information forms part of the contract: *Strata Titles Act 1985* (WA) s 69(2)(b).

<sup>57</sup> *Conveyancing Act 1919* (NSW) s 52A(2)(b); *Conveyancing (Sale of Land) Regulation 2010* (NSW) cl 8, 13 and sch 3.

<sup>58</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(f) and (g).

<sup>59</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) cl 5-7 and sch 2. These are described as implied terms in the regulation.

<sup>60</sup> The *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11 provides that every contract for the sale of residential property in the ACT must include the conditions set out in the section (except as disclosed in the contract).

<sup>61</sup> *Conveyancing Act 1919* (NSW) s 52A(2)(a).

<sup>62</sup> *Sale of Land Act 1962* (Vic) s 32(3).

<sup>63</sup> Where relevant, certain documents are required to be provided such as a copy of by-laws of the community title and documents supplied by the community corporation such as minutes of the general meeting etc: *Land and Business (Sale and Conveyancing) Regulations 2010* (SA) sch 1, div 2.

<sup>64</sup> Residential Property Transactions Bill 2013 (Tas) cl 7(1).

<sup>65</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 10.

<sup>66</sup> *Strata Titles Act 1985* (WA) s 69(1).

- (c) Do you think a statutory warranty regime may result in duplication of searches and transaction costs, with the buyer still undertaking inquiries and searching property records to verify the warranties provided by the seller?

**Option 2** – Certificates from agencies (for example a local government certificate or body corporate certificate).

- (d) Do you think requiring sellers to provide ‘certificates’ from state and local government agencies would work in Queensland?
- (e) What do you think might be the advantages or disadvantages of this form of disclosure? For example, one advantage is that all the relevant local government information is in the one document and obtained from a single source. A disadvantage is that the certificates may not always be accurate which means buyers may continue to undertake their own inquiries and searches.
- (f) If certificates are used, to what extent should the seller be able to rely on these certificates and be protected from negligence or error of the local or state government providing the certificate?
- (g) Would providing a certificate to a buyer increase the costs incurred by the seller?

**Option 3** – Seller Statement (and documents)

- (h) Do you think requiring a seller to provide a ‘statement’ setting out information about the property and certain documents would work in Queensland?
- (i) What do you think might be the advantages or disadvantages of this form of disclosure? For example, an advantage may be that there is a significant amount of information which should be within the seller’s knowledge or accessible through searches. A disadvantage may be that buyers will be reluctant to rely on a seller statement without undertaking searches and inquiries to verify the information, thereby increasing and duplicating transaction costs.

**Option 4** – A combination of any of the options above.

- (j) Do you think a combination of the options above might be appropriate for a seller disclosure regime in Queensland? If so, what combination of options do you think will work ?
- (k) Do you think there are alternative options available for the form that disclosure might take? If so, what are these? For example, do you think there should be a prescribed ‘form’ that a seller fills out based on information they have obtained from undertaking relevant inquiries or from their own knowledge?



## Community Titles lots

15. Do you think seller disclosure for community titles lots should take a different form from the options mentioned above? If so, what form do you think it should be in and why?

### 3.3. Timing of disclosure

#### 3.3.1. Queensland

The contractual seller warranties set out in the standard form REIQ contract take effect at different stages of the conveyancing process. For example, the seller makes a number of warranties under the REIQ standard House and Residential Land contract of sale that will be correct at settlement including that:

- The seller is the registered owner of an estate in fee simple;
- The seller will be capable of completing the contract;
- There will be no unsatisfied judgment or order or writ affecting the property.<sup>67</sup>

Other warranties contained in the contract operate at both the time the contract is entered into and at settlement. For example, the seller warrants that there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property.<sup>68</sup> The contract also includes a warranty that only operates at the contract date relating to, amongst other matters, the seller's knowledge of facts or circumstances that may lead to the classification of the land as contaminated land under the *Environmental Protection Act 1994* (Qld).<sup>69</sup>

The timing of the disclosure obligations that exist under Queensland legislation depends on the relevant Act and provision. There is no consistency between these obligations in terms of timing. For example:

- in the case of existing or proposed lots, the BCCM Act requires the seller to provide a disclosure statement before the buyer 'enters a contract';<sup>70</sup>
- some of the statutory warranties set out in the BCCM Act operate at the date of the contract but one is given at contract and must be valid at settlement;<sup>71</sup>
- a disclosure plan and disclosure statement or a copy of the plan of survey for a proposed allotment is required to be disclosed before a person 'enters upon a purchase' under the *Land Sales Act 1984* (Qld);<sup>72</sup>
- disclosure about contaminated land or an entry order to investigate or conduct work to minimise environmental harm must be provided to the buyer 'before the seller agrees to dispose of the land';<sup>73</sup>

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<sup>67</sup> REIQ Contract for Houses and Residential Land (9<sup>th</sup> ed) sub-cl 7.4(1)(a), (c) and (d).

<sup>68</sup> REIQ Contract for Houses and Residential Land (9<sup>th</sup> ed) cl 7.4(2).

<sup>69</sup> REIQ Contract for Houses and Residential Land (9<sup>th</sup> ed) cl 7.4(3)(a)(ii).

<sup>70</sup> BCCM Act ss 206 and 213.

<sup>71</sup> BCCM Act ss 223(2) and 223(3).

<sup>72</sup> *Land Sales Act 1984* (Qld) s 9.

- notification about the existence of an electrical safety switch and smoke alarms must be given ‘on or before the date of possession’;<sup>74</sup>
- notice of an undischarged coastal protection notice or tidal work notice must be given ‘14 days prior to settlement’;<sup>75</sup>
- QCAT orders or applications relating to a tree must be provided before the buyer ‘enters into a contract of sale’.<sup>76</sup>
- GCCC Local law requires a term to be included in the contract ‘when the buyer becomes bound by the contract’.<sup>77</sup>

### 3.3.2. Other Australian statutory disclosure regimes

The timing of disclosure in the other Australian jurisdictions is clearly set out in the operative legislation in each State and Territory. Table 2 below provides an overview of when disclosure must occur. Victoria, New South Wales, Tasmania and the Australian Capital Territory require pre-contract disclosure. In the Australian Capital Territory the information required as part of the disclosure regime must be made available for inspection at all reasonable times when an offer to buy the property can be made. South Australia is the only jurisdiction that requires disclosure after the contract is signed but before the contract settles. The proposed disclosure regime in Tasmania requires the various documents to be included as part of the contract, so disclosure occurs when the contract is provided to the buyer.<sup>78</sup>

**Table 2 Comparison of timing of statutory disclosure obligations**

Timing	NSW	Vic	SA	Tas	ACT	WA
At all reasonable times when an offer to buy the property can be made					Yes <sup>79</sup>	
Before contract is signed by seller	Yes <sup>80</sup>	Yes <sup>81</sup>				Yes <sup>82</sup>
At the time the contract is provided to the buyer				Yes <sup>83</sup>		
Before the contract settles			Yes <sup>84</sup>			

<sup>73</sup> *Environmental Protection Act 1994* (Qld) s 421.

<sup>74</sup> *Electrical Safety Regulation 2002* (Qld) regs 77 and 78 and *Fire and Rescue Service Act 1990* (Qld) s 104RK.

<sup>75</sup> *Coastal Protection and Management Act 1995* (Qld) s 65.

<sup>76</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83.

<sup>77</sup> *Gold Coast City Council Local Law No. 17 (Maintenance of Works in Waterway Areas) 2013* s 15.

<sup>78</sup> Residential Property Transactions Bill 2013 (Tas) cl 7. The Explanatory Material for the Bill suggests that the reason for this approach is the extensive contracting out provisions contained in the Bill. Providing the disclosure documents earlier may prove to be unnecessary if the seller is only willing to sell on the basis that the disclosure provisions are excluded.

<sup>79</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 10(1). The required documents must be available for inspection by a prospective buyer at all reasonable times when an offer to buy the property may be made to the seller.

<sup>80</sup> *Conveyancing Act 1919* (NSW) s 52A(2)(a).

<sup>81</sup> *Sale of Land Act 1962* (Vic) s 32(1)(a).

<sup>82</sup> *Sale of Land Act 1970* (WA) s 7(1) and *Strata Titles Act 1985* (WA) s 69(1).

<sup>83</sup> Residential Property Transactions Bill 2013 cl 7.

New South Wales has statutory warranties as a component of its disclosure regime. The warranties take effect at the date of the contract and cover matters relating to adverse affectations of the land, the exclusion of any part of a sewer belonging to a recognised sewerage authority from the land and that there is no matter in relation to the building on the land that would justify the making of a demolition order. Similarly, the Australian Capital Territory legislation includes two statutory warranties, one which takes effect at the date the contract is made and the other is operative when the contract is completed.<sup>85</sup>

### Questions

16. Is the timing of the various disclosure obligations in Queensland appropriate?
17. Do you think there are any practical problems with the current timing of the disclosure obligations in Queensland? If so, what are these?
18. It is clear after looking at the timing of disclosure in other jurisdictions that there are two main options for when disclosure may occur:

Option 1: Disclosure provided prior to the contract being signed by the buyer.

- (a) Do you think requiring seller disclosure prior to the buyer signing the contract would work in Queensland?
- (b) If so, at what point should the disclosure occur? For example, in the ACT the disclosure material must be available for inspection by a prospective buyer at all reasonable times when an offer to buy the property may be made. New South Wales and Victoria do not specify any time period but simply require the information to be given to the buyer before he or she signs the contract of sale.

Option 2: Disclosure after a contract has been signed but before settlement.

- (c) Do you think requiring seller disclosure after the buyer has signed the contract of sale would work in Queensland?
  - (d) If so, at what point should disclosure occur after the contract has been signed by the buyer. For example, in South Australia the seller must provide the required information at least 10 clear days before the date of settlement.
19. If you do not think any of the options in Question 18 above are suitable, do you have any other alternative options that you think would work?

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<sup>84</sup> *Land and Business (Sale and Conveyancing) Act 1994* s 7(1).

<sup>85</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 11(1)(f) and (g).

### 3.4. Content of disclosure

#### 3.4.1. Defects in Title

##### 3.4.1.1. Queensland

The obligation to disclose details of defects in title arise under common law and contract in Queensland. There is no obligation to provide copies of the relevant documents verifying these details. Table 3 below sets out the disclosure obligations relevant to defects in title which are applicable in Queensland.

**Table 3 Disclosure Obligations for Defects in Title<sup>86</sup>**

Obligation	Yes/No	Source of Obligation
Title Details (Lot on Plan and Certificate of Title reference)	Yes	Common law and contract
Copy of Title and registered Plan	No	-
Encumbrance details (registered)	Yes	Common law and contract
Copy of registered encumbrances and relevant plan	No	-
Unregistered statutory encumbrance details (eg sewerage and drainage)	Yes	Common law and contract
Unregistered statutory encumbrance (relevant documents)	Yes	Contract <sup>87</sup>

##### 3.4.1.2. Other Australian statutory disclosure regimes

The other Australian jurisdictions still rely on the common law for the provision of title and encumbrance details. However, as can be seen from Table 4 below, there are a number of statutory obligations imposed which require the disclosure of the relevant title and encumbrance documents (including unregistered encumbrances).

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<sup>86</sup> This table has been adapted from a table located in Christensen et al, above n 14, 161.

<sup>87</sup> The REIQ Contract for Residential Lots in a Community Titles Scheme cl 8.5(1) and the Contract for Houses and Residential Land cl 8.4(1) requires the seller to provide copies of documents relating to any unregistered interests in the property before settlement.

**Table 4 Comparison Jurisdictional Statutory Disclosure Obligations for Defects in Title<sup>88</sup>**

Obligation	NSW	SA	ACT	Vic	Tas	WA <sup>89</sup>
<b>Title Details (Lot on Plan and Certificate of Title reference)</b>	No	Yes <sup>90</sup>	No	No	No	No
<b>Copy of Title and registered Plan</b>	Yes <sup>91</sup>	No	Yes <sup>92</sup>	Yes <sup>93</sup>	Yes <sup>94</sup>	Yes <sup>95</sup>
<b>Encumbrance details (registered)</b>	No	Yes <sup>96</sup>	No	Yes <sup>97</sup>	No	No
<b>Copy of registered encumbrances and relevant plan</b>	Yes <sup>98</sup>	No	Yes <sup>99</sup>	No	No	No
<b>Unregistered statutory encumbrance details (eg sewerage and drainage)</b>	Yes (statutory warranty) <sup>100</sup>	Yes <sup>101</sup>	Yes <sup>102</sup>	Yes <sup>103</sup>	No	No
<b>Unregistered statutory encumbrance (relevant documents)</b>	No	No	No	No	Yes <sup>104</sup>	No

<sup>88</sup> This table has been adapted from a table contained in Christensen et al, above n 14, 161 and only identifies the statutory disclosure requirements. There are common law and contractual disclosure obligations in relation to defects in title information which are not reflected in this table.

<sup>89</sup> The Western Australian statutory obligations only relate to lots in strata title schemes under the *Strata Titles Act 1985* (WA).

<sup>90</sup> *Land and Business (Sale and Conveyancing) Regulations 2010* (SA) sch 1, form 1 'Vendor statement'. The form requires a description of the land to be included in the details on the form including any certificate of title reference.

<sup>91</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 1.

<sup>92</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 9(1)(b) and (c).

<sup>93</sup> *Sale of Land Act 1962* (Vic) s 32(3).

<sup>94</sup> Residential Property Transactions Bill 2013 (Tas) cls 7(1)(a) and (b).

<sup>95</sup> *Strata Titles Act 1985* (WA) s 69A(b).

<sup>96</sup> *Land and Business (Sale and Conveyancing) Regulations 2010* (SA) sch 1, div 1.

<sup>97</sup> *Sale of Land Act 1962* (Vic) s 32(2).

<sup>98</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 1.

<sup>99</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(1)(d).

<sup>100</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 3, pt 1.

<sup>101</sup> *Land and Business (Sale and Conveyancing) Regulations 2010* (SA) sch, div 1.

<sup>102</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(1)(e).

<sup>103</sup> *Sale of Land Act 1962* (Vic) s 32(2).

<sup>104</sup> Residential Property Transactions Bill 2013 (Tas) cl 7(1)(c).

## 3.4.2. Defects in Quality of title

### 3.4.2.1. Queensland

Although Queensland does not have a unified statutory disclosure regime in place, the combined effect of the contractual disclosure obligations and those set out in statute is to require the disclosure of a large number of matters which impact on the quality of title of the sale property. Some of this information is the same as the information required to be disclosed in other jurisdictions with statutory disclosure regimes. For example:

- government notices or orders;
- heritage/national estate information (except in the case of Victoria);
- proposed resumptions/acquisitions of the land (except in the case of Tasmania).

However, the Queensland disclosure obligations also extend to certain information which is not required in most of the other jurisdictions. For example, the existence of a tree order or tree application filed with the Queensland Civil and Administrative Tribunal and coastal protection information is required to be disclosed in Queensland, where relevant. The other jurisdictions, apart from New South Wales, do not include this information as part of their seller disclosure obligations. Annexure 4 provides a comparison of the information required to be disclosed in the various jurisdictions and in Queensland.

### 3.4.2.2. Other Australian statutory disclosure regimes

It is clear from Annexure 4 that there is an absence of uniformity between the jurisdictions regarding the information which is required to be disclosed under legislation. For example, only Queensland and South Australia disclose information about mining tenements. Tasmania, under its proposed regime, is the only jurisdiction which requires information about whether graves are located on the land. Information relating to biodiversity and threatened species is required to be disclosed in New South Wales but not in any other jurisdiction. A number of key matters of note include:

- no jurisdiction (including Queensland) requires the disclosure of structural defects;
- information about flooding is only disclosed in New South Wales;
- energy efficiency ratings, pest reports and building reports do not form part of the disclosure obligations, except in the Australian Capital Territory;
- local government planning and zoning information;
- government notices or orders are required to be disclosed in all jurisdictions.<sup>105</sup>

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<sup>105</sup> Christensen et al, above n 14,164.

### **3.4.3. Defects in Quality of Title - additional information required for strata and community title property**

#### **3.4.3.1. Queensland**

Additional information in relation to strata title property is required to be disclosed by a seller under the BCCM Act. This information includes:

- annual lot contributions payable (or likely to be payable);
- details of the secretary or manager of the body corporate;
- body corporate assets;
- improvements on common property for which the owner is responsible;
- actual, contingent or expected liabilities beyond normal operating expenses.

Annexure 5 provides a comparison of the information disclosure requirements in Queensland in relation to strata title lots, compared to the other jurisdictions.

#### **3.4.3.2. Other Australian statutory disclosure regimes**

There are substantial variations between the information required to be disclosed for strata title units and lots in community title schemes under the statutory regimes in the other jurisdictions. A number of key matters to note include:

- Insurance information is only required in four of the jurisdictions;
- South Australia and the Australian Capital Territory require the disclosure of minutes of general meetings of the body corporate;
- Information about repairs and maintenance is only required in Victoria;
- All jurisdictions, apart from the Australian Capital Territory (and Queensland), include the provision of by-laws as a disclosure obligation;
- Most jurisdictions require information about the annual lot contributions payable.

#### **Questions**

**20. Do you think the information currently required to be disclosed by sellers under the Queensland system is appropriate?**

**21. It is clear from the discussion above that the information currently disclosed by sellers in Queensland and the jurisdictions with a statutory disclosure regime can be categorised as:**

- **Information about the title to the property (for example certificate of title reference and registered encumbrances etc); and**
- **Information about the property that may affect its use (and ultimately its value).**

**Some possible variations to the current disclosure categories include:**

**Option 1: Providing information only about matters that affect the title to the property**

**Option 2:** Providing information about matters that affect the title to the property and information which directly impacts on the value of the property.

**Option 3:** Providing information about matters that affect the title to the property, information which directly impacts on the value of the property and other additional information which impacts on the use of the property.

(a) Do you think any of these options are appropriate for a Queensland seller disclosure regime?

(b) If so, which option/s and why do you think it would be suitable?

22. From your experience, what information do buyers want to know before purchasing a property?
23. If you have been a buyer of property, what information did you want to know before making the decision to purchase your property?
24. Is there other information not identified in Table 4 above and Annexure 4 and 5 which you think would be important to buyers when purchasing a property in Queensland? For example, the ACT seller disclosure regime requires the seller to obtain a building inspection report and a pest inspection report.
25. Is there any information which a seller is currently required to disclose in Queensland and which you consider should be excluded from any disclosure obligations? If so, why?
26. Do you think buyers consider and use all the information currently provided in Queensland for the purpose of making a decision to purchase a property? If so, what information, in your experience, do they value the most for the purpose of making their decision?
27. What information is within the scope of a seller's knowledge but not accessible by the buyer?
28. To what extent do buyers in Queensland undertake their own inquiries to verify information provided by sellers or to simply undertake their own due diligence?
29. Do you think there is any need for cooling off periods if there is a pre-contract mandatory statutory disclosure regime in place in Queensland?
30. If you support the retention of a cooling off period, do you think the period of time allowed should be reduced?



### Additional disclosure for strata/community titles lots

31. Do you think there is additional information which should be disclosed by a seller and which would be of value to a buyer when deciding whether to purchase a community titles lot? For example, would information about insurance held by the body corporate including a certificate of currency, sinking and administrative fund balances and by-laws be valuable to a buyer?

## 3.5. Currency of information

### 3.5.1. Queensland

There do not appear to be any specific obligations in Queensland in relation to the currency of any information required to be disclosed under statute or contract.

### 3.5.2. Other Australian statutory disclosure regimes

Only the Australian Capital Territory and Tasmania appear to have specific requirements in relation to the currency of certain documents which are required to be disclosed. A summary of some of the requirements are set out below:

- Australian Capital Territory – both the pest inspection and building and compliance reports must be based on an inspection carried out no earlier than 3 months before the property was first advertised, offered for sale or listed by an agent;<sup>106</sup>
- Tasmania – a number of government certificates issued in relation to the property must not be more than 9 months old before the date on which the contract is made.<sup>107</sup> Similarly, any written evidence of insurances held by the body corporate for a strata scheme must not be more than 6 months old before the date on which the contract is made.<sup>108</sup>

### Question

32. Do you think that a statutory disclosure regime should specify how current or up to date certain documents must be before they are disclosed?

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<sup>106</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(1)(h).

<sup>107</sup> Residential Property Transactions Bill 2013 (Tas) cl 7(1)(e) (local government certificate) and cl 7(1)(f)(water and sewerage certificate).

<sup>108</sup> Residential Property Transactions Bill 2013 (Tas) cl 7(1)(g)(iii).

## 3.6. Continuing disclosure obligations

### 3.6.1. Queensland

There are some limited ‘ongoing’ statutory disclosure obligations in Queensland however these are currently limited to off the plan sales.<sup>109</sup> The disclosure provided in the case of off the plan sales occurs before the buyer signs the contract and any requirement to notify changes relates only to the accuracy of the information. The only other obligation to provide continuing disclosure between the making of the contract and completion is set out under clause 8.3 of the REIQ Contract for Houses and Residential Land.<sup>110</sup> Under this clause, the seller is required to promptly give the buyer a copy of any notice, proceeding or order that affects the property or requires work on the property.

### 3.6.2. Other Australian statutory disclosure regimes

There appears to be only two jurisdictions, South Australia and Western Australia that impose continuing disclosure obligations on the seller. A ‘fresh statement’ approach is taken under the South Australian legislation which essentially has the effect that if any changed circumstances would have to be included if a ‘fresh’ or new statement was produced, then the statement should be updated. The obligation arises in South Australia before the contract settles. The position in Western Australia is slightly different and only applies to lots in a strata title scheme. The obligation applies after the contract is signed but before the buyer becomes the registered proprietor.<sup>111</sup> The seller is required to provide written notice of the full particulars of any ‘notifiable variation’.<sup>112</sup> Table 5 below provides an overview of the continuing disclosure obligations in the relevant jurisdictions.

**Table 5 Continuing disclosure obligation – requirements to update or ensure information still accurate**

Jurisdiction	Updating provision?	Circumstances when disclosure information must be updated?	When must updating occur	Consequences if no compliance with provision
NSW	No			

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<sup>109</sup> See *Land Sales Act 1984* (Qld) ss 10 and 22 and *BCCM Act* ss 209 and 217.

<sup>110</sup> The same obligation applies in clause 8.7 of the REIQ contract for Residential Lots in a Community Titles Scheme.

<sup>111</sup> *Strata Titles Act 1985* (WA) ss 69C(1) and (3).

<sup>112</sup> *Strata Titles Act 1985* (WA) s 69C(3). The term ‘notifiable variation’ is defined in section 69C(3) of the Act.

<b>Vic</b>	No			
<b>SA</b>	Yes <sup>113</sup>	If after the date of service of statement but before buyer signs the contract, circumstances change so that if a fresh statement were to be prepared there would have to be some change in the particulars contained in the statement.	Before buyer signs the contract.	Fine. <sup>114</sup>  Apply to Court to seek relevant order to avoid the contract, award damages or other orders as Court deems just. <sup>115</sup>  Defence available. <sup>116</sup>
<b>Tasmania</b>	No			
<b>ACT</b>	No			
<b>WA</b>	Yes <sup>117</sup>	Notifiable variation occurs before the registration of the buyer as proprietor of the lot or proposed lot or earlier avoidance of the contract. <sup>118</sup>	As soon as the seller becomes aware of the variation. <sup>119</sup>	'Avoid the contract' where:  Failure to substantially comply with the obligation within the required time. <sup>120</sup>  The seller substantially complies with the section and the buyer has been materially prejudiced. <sup>121</sup>

### Questions

**33. Do you think a seller should have any ongoing obligation to advise a buyer of any material changes to particulars in disclosure documents or statements?**

**34. At what stage of the conveyancing transaction do you think there should be no ongoing obligation to update the material previously provided?**

<sup>113</sup> *Land and Business (Sale and Conveyancing) Act 1994 (SA) s 10.*

<sup>114</sup> *Land and Business (Sale and Conveyancing) Act 1994 (SA) s 14.*

<sup>115</sup> *Land and Business (Sale and Conveyancing) Act 1994 (SA) s 15.*

<sup>116</sup> *Land and Business (Sale and Conveyancing) Act 1994 (SA) s 16.*

<sup>117</sup> *Strata Titles Act 1985 (WA) s 69C.* A notifiable variation will occur if one of the matters set out in s69C(3) exists. For example, the registered or proposed strata/survey-strata plan is varied in a material particular or a lease, licence or right or privilege in relation to the common property is granted or varied.

<sup>118</sup> *Strata Titles Act 1985 (WA) s 69C(3).*

<sup>119</sup> *Strata Titles Act 1985 (WA) s 69C(2).*

<sup>120</sup> *Strata Titles Act 1985 (WA) s 69D(1).*

<sup>121</sup> *Strata Titles Act 1985 (WA) s 69D(2).*

35. **Should sellers be required to warrant the accuracy of the disclosed information up until a certain time period. For example, a warranty as to accuracy at the time of contract being signed or at the time of settlement?**
36. **Should continuing disclosure obligations be limited to proposed lots or allotments?**
37. **Are there any risks or issues associated with not having a continuing disclosure regime?**
38. **Should there be mechanisms in a disclosure regime which address any risks associated with the disclosure of information that is not current?**

## 3.7. Remedies

### 3.7.1. Queensland

There are remedies available in certain circumstances where a disclosure obligation is not complied with. The availability and nature of the remedy depends on the particular disclosure obligation and whether it is imposed under contract or statute. Annexure 1 and 2 provide an illustration of the disclosure obligations under statute and contract in Queensland and the disparity in relation to the available remedies. The information in Annexure 1 and 2 illustrates that there is no uniform approach in relation to the availability of remedies, the terminology used, the type of remedy, the timing and the effect of the remedy. A number of matters to note in relation to the statutory remedies available include:

- The terms ‘terminate the contract’, ‘avoid the contract’ and ‘rescind the contract’ are used within the sections of the Acts that provide remedies. There is no uniformity in relation to the language used and whether the effect of the statutory remedies are intended to be the same;
- Fines only are imposed in relation to failing to disclose information such as the existence of smoke alarms, approved safety switch and pool safety certificate or the relevant notice;
- Multiple remedies may be available for failure to comply with a disclosure obligation. For example, failure to provide the relevant disclosure in relation to tree orders and applications or contaminated land information under the *Environmental Protection Act 1994* can attract both termination rights and other civil penalties;
- In the case of strata title lots, termination rights are available under the BCCM Act for failure to comply with disclosure obligations. However, in the case of proposed lots, where inaccurate information is provided, a material prejudice test is applied before the termination right is available;
- The remedies under the standard form contracts can vary between full termination rights or termination only if the buyer is materially prejudiced by the breach of a warranty in the case of strata title lots.

### 3.7.2. Other Australian statutory disclosure regimes

The position in relation to remedies is clearer in the jurisdictions that have a statutory disclosure regime in place, reflecting the fact that there is a single source in each location for the disclosure obligations. Annexure 6 provides an overview of the remedies available. A number of comments can be made about the remedies:

- A buyer is able to rescind the contract of sale in New South Wales, Victoria, Tasmania and the Australian Capital Territory;
- In the case of strata title in Western Australia, a buyer is able to avoid the contract;
- The regime in South Australia allows a buyer to apply to the relevant Court for an appropriate order;
- Some jurisdictions impose pre-conditions before the remedy is available. For example, in South Australia, the Court needs to be satisfied that the buyer has been prejudiced by the failure to comply with the disclosure obligation. Similarly, in New South Wales there are three conditions that need to be met before the remedy is available;
- Other penalties in the form of fines are available in certain circumstances in the Australian Capital Territory, Tasmania and South Australia.

#### **Questions**

39. **In your experience, how difficult is it to identify the remedies available in Queensland for failure to comply with disclosure obligations?**
40. **Do you think the current remedies available in Queensland for failure to comply with disclosure obligations are appropriate?**
41. **Do you know whether buyers have successfully relied on these remedies?**
42. **Should the remedies be streamlined? If so, how could this be achieved in the light of the current regime?**
43. **If a statutory seller disclosure regime is introduced in Queensland should the right of termination be available where:**
  - (a) **The information provided by the seller under the disclosure regime is inaccurate?**
  - (b) **The information provided by the seller under the disclosure regime is substantially inaccurate?**
  - (c) **The disclosure is incomplete because information is missing?**
  - (d) **The seller fails to provide disclosure at all?**
44. **Should any remedy only be available where the seller has suffered material prejudice as a result of the omission, inaccuracy or failure of the buyer to comply with the disclosure obligations?**
45. **Do you think a buyer should be entitled to compensation arising from a seller's failure to**

**comply with statutory disclosure obligations? Should any compensation be limited to situations where the buyer has suffered a material loss or do you think compensation should not be available in any circumstances?**

### **3.8. Contracting out provisions**

#### **3.8.1. Queensland**

The disclosure regime in place in relation to existing and proposed lots in a community titles scheme under the BCCM Act prohibits the contracting out of the disclosure obligations.<sup>122</sup> This position is consistent with the approach adopted under the statutory disclosure regimes in the other Australian jurisdictions.

#### **3.8.2. Other Australian statutory disclosure regimes**

There is an express statutory provision in each jurisdiction, apart from the proposed regime in Tasmania, which prohibits the contracting out of any disclosure obligation. The provision in New South Wales does qualify this absolute prohibition by reference to any regulations which provide to the contrary.<sup>123</sup> Annexure 7 sets out the position in each jurisdiction and the consequences of any attempt to contract out.

#### **Questions**

46. **Do you think there should be any capacity to contract out of statutory disclosure obligations?**
47. **If so, in what circumstances should this be permitted?**

### **3.9. Exclusions/exemptions from the statutory disclosure obligations**

#### **3.9.1. Queensland**

The structure of the Queensland disclosure regime does not accommodate the inclusion of provisions that exempt certain transactions or categories of property from the disclosure obligations. The application of a particular disclosure obligation is assessed on a case by case basis and depends on the content of the statutory or contractual obligation. For example, whether or not a buyer is required to give notice of contaminated land under the *Environmental Protection Act 1994* (Qld) depends on whether the particulars of the land are recorded in the contaminated land register. The obligation to disclose this information under statute does not exist where there is no such record.

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<sup>122</sup> BCCM Act s 318.

<sup>123</sup> To date, there is no provision in regulations which alter the position in New South Wales.

### 3.9.2. Other Australian statutory disclosure regimes

There are exclusion provisions in some of the jurisdictions which are not uniform. South Australia, Victoria and Western Australia do not appear to have any operative provisions in their legislation which exclude the statutory disclosure obligations, although South Australia does allow for this to occur through its regulations.<sup>124</sup> The relevant legislation in New South Wales, the Australian Capital Territory and Tasmania do include exclusion provisions, although there is limited consistency in relation to the sale contracts which are excluded from the operation of the disclosure regimes. The three exclusion categories in the Australian Capital Territory; mortgagee sales, sale by Court order and sale by registered or official trustee under the *Bankruptcy Act 1966* (Cth); exclude the operation of specific warranties from disclosure.<sup>125</sup> Annexure 8 provides an overview of the exclusion arrangements in the jurisdictions.

#### Questions

48. Are there any categories of sellers or transactions that you think should be excluded from the operation of statutory disclosure obligations? For example, sales between related companies, between government departments and statutory bodies or commercial sales etc?
49. Do you think mortgagee sales should be exempt from seller disclosure obligations? If so, in what circumstances should they be excluded?
50. Do you think options to purchase should be exempt from seller disclosure obligations? If so, in what circumstances should they be excluded? For example, where there is at least three calendar months between the granting of the option and its exercise?

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<sup>124</sup> Section 41(2)(a) of the *Land and Business (Sale and Conveyancing) Act 1994* (SA) provides that regulations can exempt (conditionally or unconditionally) classes of persons or activities from the application of the Act or specified provisions of the Act. However, there does not appear to be any exempt transactions in the regulations.

<sup>125</sup> *Civil Law (Sales of Residential Property) Act 2003* (ACT) s 11(2). Building and conveyancing inquiry documents and building and compliance inspection reports are also not required for certain categories of property, including a class A unit or a residence that has not previously been occupied or sold as a dwelling: s 9(2)(a)(i) and (ii). A pest inspection is also not required for a class A unit: s 9(2)(b).

## 4. Issues with the current seller disclosure regime in Queensland

There are a number of observations and comments which can be made about the existing state of the seller disclosure regime in Queensland taking into account the key considerations identified earlier in the paper<sup>126</sup> and the statutory regimes operating in other jurisdictions.

### 4.1. Complexity

Firstly, the current seller disclosure regime in Queensland is imposed at common law, under contract, by statute and now under local government law. The multi-layered and 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 can be compared to the statutory regimes in other jurisdictions where there is a single Act and regulation (where applicable) which clearly sets out a seller's disclosure obligations. In the case of Queensland, there are real risks inherent in an uncoordinated framework including increased errors and omissions in completing a transaction which impacts on all parties. This has been an ongoing concern in Queensland for some time as claims arising from property transactions represent a significant part of the total cost to the professional indemnity insurance scheme for Queensland legal practitioners.<sup>127</sup> Increased insurance premiums for legal practitioners have a broader community cost in the form of increased conveyancing fees as well as buyers (and sellers) suffering loss if transactions are affected by disclosure oversights. A single, coordinated statutory disclosure framework which a number of the other jurisdictions have in place does not guarantee that errors or omissions will not occur during the conveyancing process.<sup>128</sup> However, it does assist in eliminating any uncertainty regarding what disclosure obligations are actually imposed on the seller.

The inclusion of an additional layer of disclosure obligation through local government laws (such as the GCCC Local Law) is likely to add a further level of complexity (and cost) to the conveyance process in Queensland. This is particularly the case as the application of the obligation to a particular sale is not always certain and the inclusion of the required clause in the contract of sale may in some cases be superfluous and simply added as a 'just in case' provision, without any clear understanding of whether or not it is necessary. Further, the introduction of this fourth layer of obligation at such a localised level creates a greater risk that this law (and any others that may be introduced by

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<sup>126</sup> See final paragraph of section 1.2.

<sup>127</sup> Qld Conveyancing Protocol (Background document) [http://www.lexoninsurance.com.au/managing\\_your\\_risk/conveyancing\\_protocol](http://www.lexoninsurance.com.au/managing_your_risk/conveyancing_protocol) at 19 August 2013. Since the introduction of the Protocol, the number of claims in Queensland for conveyancing generally has decreased.

<sup>128</sup> See for example the recent South Australian District Court decision in *Le Cornu & Kurda v Place on Brougham Pty Ltd* [2013] SADC 32 where part of the dispute related to whether or not a registered fixed and floating charge was a matter under s 7(1)(b) of the *Land and Business (Sale and Conveyancing) Act 1994* (SA) which needed to be disclosed under the 'mortgage, charge or prescribed encumbrance affecting the land subject to sale' disclosure category. Cuthbertson J decided that it did need to be disclosed which rendered the disclosure statement provided to the buyer inaccurate [72]. This conclusion had other ramifications for the matter generally.



Queensland local councils) may be overlooked by stakeholders who do not reside in the local area. The GCCC Local Law is discussed in more detail below.

## 4.2. Uncoordinated and subject to continual change

Secondly, the operation of the obligations imposed under the Queensland system can be uncertain, fluid and confusing in some instances. For example:

- The standard form contracts, particularly the seller warranty clauses which provide a level of consumer protection to buyers can be, (and are), deleted or amended in some transactions. This, in turn, impacts on the level of disclosure a seller may be required to provide during the transaction;
- Some contractual provisions expand the statutory disclosure obligations. For example, clause 7.4(3) of the REIQ Contract for Houses and Residential Land expands the disclosure obligation under section 421 of the *Environmental Protection Act 1994* (Qld) so that a seller should disclose information that he or she is aware of, or should be aware of, that the property may be contaminated. The statutory obligation is limited to disclosing information that is recorded in the contaminated land register or disclosing the existence of a notice under the Act;
- The form in which disclosure must be made varies significantly within and between the standard form contracts and within and between the legislative provisions that require disclosure. For example, the REIQ Contract for Commercial Lots in a Community Titles Scheme requires the seller to disclose copies of commercial tenancy documents (cl 10.6), make a number of warranties about commercial tenancies (cl 10.3) and provide a statement of certain matters relating to a commercial tenancy where requested to do so by a buyer (cl 10.1). In the case of the GCCC Local Law, a new approach has been adopted by requiring the relevant disclosure to occur by way of inclusion of a contractual term in the sale contract. In the case of the BCCM Act, a seller of an existing or proposed lot must provide a disclosure statement in the prescribed form and, where applicable, an Information Sheet;
- Timing of disclosure varies and can be prior to execution of the contract or pre-settlement or at settlement;
- The approach to remedies also varies and depends on the relevant contractual term or applicable Act;
- The application of a number of the statutory obligations of disclosure depends on the specific transaction and often requires considering a number of different sources to either include or exclude an Act. For example, the disclosure obligation under the *Sustainable Planning Act 2009* (Qld) will only apply to the sale of property within the Milton Rail Precinct which is in turn identified in the now repealed *Planning (Urban Encroachment – Milton Brewery) Act 2009*;
- Although the standard form contracts are revised and amended in response to changes in the law and relevant judicial decisions, current versions of the contract are not always used in transactions.

The Queensland system can be contrasted with the statutory regimes in the other jurisdictions which provide reasonably static and certain disclosure obligations. Any amendments to the

obligations need to proceed through the usual legislative reform processes that include considering the need for any amendments or additions.

### 4.3. No guiding principles

Thirdly, taken as a whole, the Queensland seller disclosure obligations have evolved over a long period of time without any underlying guiding principles, apart from attempting to address the possible information asymmetry arising as a result of the perceived effect of the doctrine of caveat emptor. The statutory disclosure regimes in the other jurisdictions have generally evolved in a similar manner and the comments below apply equally to those regimes. However, a number of these statutory regimes have recently been the subject of some kind of review process, although these reviews do not appear to have articulated any additional guiding principles to underpin the disclosure regime.<sup>129</sup> Developing seller disclosure obligations in the absence of some type of principled framework potentially impacts on the form the obligations take, the timing of disclosure, the content of disclosure and the remedies available for failure to comply with the obligations.

Further, imposing disclosure obligations which have not been fully considered against guiding principles and are simply reactive to a particular issue or interest group demand may increase red tape and impose additional compliance costs. The introduction of mandatory seller sustainability declarations<sup>130</sup> in Queensland in 2010 and its subsequent repeal in 2012<sup>131</sup> arguably provides an example of obligations being imposed without being considered against a principled framework. The declaration was essentially a checklist prepared by sellers that identified the residential property's environmental and social sustainability in a number of key areas including energy, water and access and safety. Sellers made the statement to the 'best of the seller's knowledge and ability'. Agents were required to advertise the availability of that declaration and buyers were required to request a copy of the declaration from the selling agent. Failure to comply with the obligation attracted a fine. The introduction of the sustainability declaration occurred against a backdrop of both international and national interest in energy reduction and sustainability measures being

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<sup>129</sup> See Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962* (2012) and Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962 Options* (2013). In 2010, New South Wales released *Review of Conveyancing (Sale of Land) Regulation 2005 Discussion Paper* as a result of sunset provisions in the 2005 regulations. A Regulatory Impact Statement also accompanied the proposed new regulations *Conveyancing (Sale of Land) Regulation 2010* in June 2010. Although the Northern Territory disclosure legislation introduced in 2010 was repealed earlier this year by the *Sale of Land (Rights and Duties of Parties) Act Repeal Act 2013* (NT), the disclosure legislation was preceded by the NT Department of Justice *Vendor Disclosure Legislation Discussion Paper* (2006). The disclosure regime set out in Part 10 of the *Property Agents and Land Transaction Act 2005* (Tas) has never commenced and was reviewed during the consultation process following the release of draft regulations. Following comments received as part of that process, the Residential Property Transactions Bill 2013 (Tas) was introduced into the Tasmanian Parliament in April 2013. The Bill will repeal the existing disclosure provisions in Part 10 and introduce an alternative regime.

<sup>130</sup> The requirement to make sustainability declarations was introduced by the *Building and Other Legislation Amendment Act 2009* (Qld) by adding Chapter 8A to the *Building Act 1975* (Qld) and Chapter 11, Part 5 of the *Property Agents and Motor Dealers Act 2000* (Qld).

<sup>131</sup> The statutory provisions requiring the disclosure of a sustainability declaration were repealed in 2012 through the *Treasury (Cost of Living) and other Legislation Amendment Act 2012* (Qld). This Act amends the *Building Act 1975* (Qld) and the *Property Agents and Motor Dealers Act 2000* (Qld) by removing the majority of the provisions relating to sustainability declarations. Some transitional provisions exist to protect buyers who have relied on a false or misleading declaration.

introduced into the residential construction legislative framework.<sup>132</sup> It was also preceded by the 2009 COAG agreement National Partnership on Energy Efficiency which outlined a number of measures including the introduction of disclosure obligations for residential building energy performance (along with other matters) for home purchases.<sup>133</sup> The policy underlying the introduction of the declaration included increasing community awareness of sustainable building features, promoting the relevance of sustainability features for the value of homes, encouraging sellers to improve the value of homes by adding sustainable building features and providing valuable comparative information about the energy efficiency of an existing home compared to a new (or renovated) home.<sup>134</sup>

A study undertaken in 2012 prior to the repeal of the provisions requiring sustainability declarations looked at the impact the declarations had on buyer decision making in the first year following the introduction of the obligation.<sup>135</sup> A summary of the preliminary findings is set out below:

- There was a high level of compliance with the legislation on the part of independent real estate agents;<sup>136</sup>
- Seller awareness of the need to provide a completed sustainability declaration was very poor, particularly in Brisbane;<sup>137</sup>
- Buyers did not request the declaration very often (less than 20%);<sup>138</sup>
- On the basis of responses of real estate agents in their dealings with buyers, 96% of buyers did not consider the sustainability declaration to be an important factor in their house purchase decision-making.<sup>139</sup>

Anecdotal evidence obtained during the study also indicates that sellers did not always fully complete the Declarations because of the potential liability associated with inaccuracies which may have also contributed to buyer disinterest in obtaining a copy of the Declaration.<sup>140</sup> The findings in the study were consistent with the literature review also undertaken by the authors that supported the position that sustainability had not been proven to be a relevant factor to the decision making process of a buyer.<sup>141</sup> The repeal of the provision requiring seller disclosure occurred as part of the current Government's promise to reduce real estate red tape.<sup>142</sup>

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<sup>132</sup> Nicolee Dixon, 'Treasury (Cost of Living) and Other Legislation Amendment Bill 2012 (Qld): Repeal of Sustainability Declarations Provisions' (Research Brief No 07, Queensland Parliamentary Library and Research Service) 2.

<sup>133</sup> This measure has been delayed. See Dixon, above n 132, 2.

<sup>134</sup> Explanatory Notes, Building and Other Legislation Amendment Bill 2009 (Qld) 3.

<sup>135</sup> Lyndall Bryant et al 'Home Sustainability policy and mandatory disclosure' (2012) 30 *Property Management* 29, 30.

<sup>136</sup> *Ibid* 40, 48.

<sup>137</sup> *Ibid* 48.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* 44.

<sup>140</sup> *Ibid* 48.

<sup>141</sup> *Ibid* 37.

<sup>142</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 17 May 2012, 82, 83 (TJ Nicholls) on the first reading of the *Treasury (Cost of Living) and other Legislation Amendment Bill 2012* (Qld). Reference was made to the market rather than a government imposed form 'dictating what is attractive to buyers' and that repealing the sustainability declaration would not prevent sellers from identifying sustainable features of their

Despite the existence of statutory seller disclosure frameworks in other jurisdictions, it is still not clear what information is optimal to the decision making process of the buyer. This is an ongoing issue in all Australian jurisdictions, irrespective of the type of disclosure regime which is in place. There has not been any Australian research to date on this issue and the assumption has often been made that disclosure of more information to consumers is advantageous to, and in the best interests of the consumer, reflecting the information asymmetry that is perceived by policy makers as arising from the operation of the doctrine of caveat emptor.<sup>143</sup> However, consumer behaviour research suggests that 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, as consumers may not even consider it, understand it or find the information useful.<sup>144</sup> Despite the absence of research investigating the optimal amount of information for property disclosure regimes, an approach to information disclosure which is not guided, at the very least, by underlying principles potentially increases the risk of disclosure regimes that are not clear or comprehensible and which ultimately confuse consumers.<sup>145</sup> Further, it also increases the risk that the information required to be disclosed is not relevant to the purchase decision.

#### **4.4. Lack of information at the time of contract**

Fourthly, in practice, at the time a contract is entered into, the information about the property is usually limited to the real property description in the contract and a note of encumbrance or leases on the title. Contracts are often signed before any searches are undertaken and any pre-contract due diligence that takes place is initiated by the buyer. The seller disclosure obligations that do exist in Queensland manifest primarily on or before settlement (but post contract exchange). In the absence of a buyer undertaking a large variety of searches prior to entering into a contract of sale, there is arguably significant information asymmetry between the seller and buyer. Even where a buyer undertakes relevant searches, he or she may still not have relevant information that may affect the decision to purchase. For example, the existence of termites and proposed government resumptions of properties or granting of mining leases are not discoverable by searches.<sup>146</sup> Where the usual practice of signing before searching occurs, a buyer is dependent on the contractual terms, statutory provisions and searches undertaken after the contract is signed to provide relevant protection if any issues associated with the property arise pre-settlement.<sup>147</sup> This in turn creates the additional issue of searches being duplicated by both the buyer and seller at different stages of the conveyancing process which increases transaction costs. Although there are differences between the statutory regimes in the other jurisdictions, there is a level of consistency in that it is clear when the disclosure obligation is imposed and what information needs to be disclosed.

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homes when offering them for sale or prevent interested buyers from taking these features into account when they compare the merits of different properties: 82, 83.

<sup>143</sup> 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.

<sup>144</sup> Ibid 252.

<sup>145</sup> Productivity Commission, *Review of Australia's Consumer Policy Framework*, Final Report (2008) 11.

<sup>146</sup> Christensen, above n 143, 266.

<sup>147</sup> *Queensland Conveyancing Protocol (v.6)* (June 2012), 5, 6.

## 4.5. Burden of accessing information

Fifthly, the diversity of the content of the disclosure obligations means that sellers (and/or buyers) undertaking relevant inquiries are required to access a number of different registries to obtain the information. A summary of some of the organisations where searches need to be requested is set out below.

- Department of Environment and Resource Management (Land Titles Registry) – copy of the community management statement;
- Environmental Protection Agency – Contaminated Land Register and Environmental Management Register;
- Qld Transport and Main Roads – approved proposals for resumptions, current proposal for resumptions;
- Local government searches – rates, town planning (zones, permissible uses) sewerage and drainage plans, building records and building notices;
- Queensland Civil and Administrative Tribunal – decisions and physical search of files for applications in relation to fences and trees;
- Court Registries – any actions commenced or bankruptcy details;
- Department of Housing and Public Works – Pool Safety Register;
- Energex/Ergon – details of connection.

The response times to the requests for information can vary. For example, searches of the QCAT Tree Order Register can be done immediately and results provided straight away, although the search provides a lengthy list which needs to be reviewed to identify the relevant property. However, requests for information in relation to tree applications made to QCAT can take up to 6 weeks to yield any results. Similarly, some matters affecting the registered title of a property are disclosed as administrative advices and are revealed by a title search. However, the actual selection of advices to include on to the Titles Office Register depends on the statutory obligation of the particular government agency and whether that obligation is mandatory or permissive.<sup>148</sup>

The absence of a central government portal to undertake these searches potentially creates efficiency issues with the search process. Similarly, there is no bundling of information which creates a requirement to make multiple requests of the same entity. This is particularly relevant to local councils which hold valuable information about the property and its surrounding area. New South Wales has dealt with this issue by the provision of a certificate issued by the relevant local council which contains information about a wide range of local authority matters in the one single source. Some of these issues can be addressed through the engagement of one of the lodging search companies present in Queensland that can undertake all the required searches for a property.<sup>149</sup> These companies are often used by law firms to simplify this part of the conveyance process. However, these companies are not always accessible to all parties, particularly in the case of unrepresented parties and there are additional costs associated with using these services, which

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<sup>148</sup> Not all statutory interests that affect title require it to be disclosed either on the title or the administrative advices register. See for example *Local Government Act 2009* (Qld) s 95 which provides that the local government ‘may’ register a charge over the land for overdue rates and charges.

<sup>149</sup> For example, Electronic Search Services and SAI Global.

are inevitably passed down to the seller or buyer. One factor which should be considered in further detail by stakeholders is the extent to which current technology can be used to create a single portal or 'one stop shop' for relevant government information.<sup>150</sup> Ease of access to state and local government information that is required to be disclosed is essential to an effective and efficient disclosure regime.

### **Questions**

- 51. Do you have a view regarding the extent to which the parties to a sale transaction should be able to rely upon the results of local and state government searches and inquiries which are undertaken?**
  
- 52. If the results of the searches are inaccurate, who should bear the responsibility for the inaccuracy?**
  
- 53. What remedy (if any) should be available to the buyer if the search results are inaccurate?**
  
- 54. In your experience, to what extent are searches undertaken by sellers in Queensland for a conveyance of property duplicated by buyers?**
  
- 55. Do you think there is a way to address any duplication of searching undertaken by both sellers and buyers?**
  
- 56. Do you think the existing information systems providing access to state and local government information in Queensland limit the way in which disclosure obligations can develop?**
  
- 57. Are enhancements to the system required?**

## **4.6. Costs**

Sixthly, it is inevitable that seller disclosure regimes have costs implications. In the absence of an economic analysis of the costs associated with the current Queensland disclosure regime it is

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<sup>150</sup> The possibility of a 'one stop shop' was considered to some extent in the Queensland Competition Authority (QCA) Report *Measuring and Reducing the Burden of Regulation Final Report* (2013) 54 in the context of a mechanism to eliminate duplication. The QCA noted that a reduction or elimination of duplication would eliminate burden without eliminating regulatory effect: 53.

difficult to quantify the relevant cost burdens or ultimate economic incidence (that is, whether it is the seller or buyer that bears the greatest economic burden – as opposed to legal burden - of those costs). However, it is clear that a prudent buyer undertaking pre-contract due diligence will incur costs associated with the inquiries made in relation to the property. Further, the seller will also bear costs in complying with the applicable disclosure obligations at different points during the transaction, generally commencing after the formation of the contract. A buyer may continue to incur costs despite disclosure by the seller by duplicating searches undertaken by the seller to verify the information provided. Increased transaction costs are disadvantageous to both sellers and buyers with the increased costs passed on to buyers in the form of higher priced properties, or alternatively are borne by sellers. Any disclosure regime should aim to balance both the provision of information to ensure buyers are properly informed about the relevant property and keeping the costs to sellers of preparing disclosure documentation to a minimum.<sup>151</sup>

### **Questions**

- 58. What are the costs associated with the current seller disclosure obligations in Queensland to the seller and buyer?**
- 59. Do the perceived benefits of buyers receiving this information outweigh any costs incurred by sellers in providing the information?**
- 60. Do you think there is currently a balance in Queensland between the costs associated with seller disclosure and providing the buyer with information relevant to the purchase decision?**

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<sup>151</sup> Christensen et al, above n 14, 155.

## 5. Towards a Framework for reform

### 5.1. Proposed framework

The principal rationale for requiring pre-contract seller disclosure is usually to reduce the information asymmetry between the seller and buyer, on the basis that the seller has more knowledge about the property, and to ensure that a buyer is aware of all relevant facts about the property before agreeing to purchase. A seller disclosure regime should also aim to provide information of optimal value and relevance to a buyer and not increase the overall cost burden of either seller or buyer. It is clear from the discussion above that the current Queensland disclosure obligations do not necessarily meet these objectives. A seller disclosure system that simply relies on addressing the information imbalance that is perceived by policy makers as originating from the operation of the doctrine of caveat emptor as a guiding principle is unlikely to produce a regime that is structured or coordinated. The seller disclosure framework should also contribute to a more effective sale and conveyancing process in Queensland achieving 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;
- Balancing the information cost between buyer and seller.

A single statutory framework allows a regime to be established that imposes clear obligations on a seller, has a consistent form of disclosure, one point in time for disclosure of all relevant matters and proportionate and consistent remedies for a failure to comply.

As discussed above, any seller disclosure framework requires guiding principles that underpin the form it takes, its content and ongoing additions or changes to it. A suggested approach to achieving these objectives is to use the following guiding principles as a benchmark for any seller disclosure regime:

- 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;
- Information should be of value to a buyer in making a decision to purchase. This includes primarily information impacting on title to the property or significant financial liability arising from ownership;
- The information should be in an accessible form, easily understood and capable of being relied upon by the buyer;
- A single legal framework should be established providing consistency in the form and timing of disclosure and remedies available for a failure to comply.

Other alternative approaches or principles may also provide appropriate benchmarking and the ones listed above are not intended to be prescriptive but merely to provide an illustration of one possible framework.



## 5.2. Case studies

By way of example of the difficulties inherent in an ad hoc approach to seller disclosure we offer some comments about the consistency of three different disclosure obligations currently operative in Queensland and how these obligations may be different if measured against the guiding principles identified above. These obligations are the disclosure:

- through a clause in the sale contract under the GCCC Local Law;
- of a copy of an order made by, or application to, the QCAT in relation to a tree on the property required under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld);
- of a statement under the BCCM Act.

### 5.2.1. Information should be within the seller's knowledge or readily obtainable by search at reasonable cost

#### 5.2.1.1. GCCC Local Law

The framework established by the GCCC Local Law fails to take into account the cost burden of providing this information in the following ways:

- There is no central register of properties affected that could be searched by either seller or buyer to determine the application of the GCCC Local Law to the property. A rates search of the council merely contains a warning that the GCCC Local Law may apply, leaving it to the seller to use their own judgement. It is also unlikely, unless a notice has been issued by the council to the seller, that a seller will be able to ascertain the application of the law from their own knowledge;
- The drafting of s 15 of the GCCC Local Law is potentially unclear which may make it difficult for even the seller's lawyer to determine its application to the property;<sup>152</sup>
- There may be some inconsistency between the Council guidance documents in relation to the GCCC Local Law and the law itself which could lead to further uncertainty as to its application;
- A seller may require legal advice about the application of the GCCC Local Law and to make relevant inquiries. Where this is inconclusive, the seller may need to consult a building professional in order to reach a conclusion.

The cost of disclosure is therefore significantly more than required under other statutes where information a seller must disclose, such as the existence of a tree order, is easily verifiable by search or is within the seller's knowledge.

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<sup>152</sup> The section requires consideration of a number of complex definitions, not only in the GCCC Local Law but also in the *Land Title Act 1994* (Qld) and the *Sustainable Planning Act 2009* (Qld).

### 5.2.1.2. Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 - tree application or order

The obligation imposed on the seller under this Act arises where the land being sold is affected by an application to, or an order of, QCAT (being land on which a tree the subject of an application or order is situated). The seller is required to give the buyer a copy of the application or order before the buyer enters the contract.<sup>153</sup> Whether or not a tree on the relevant land is either the subject of a QCAT application or an order should be within a seller's knowledge. Access to this information is relatively simple and can be obtained from QCAT. In the case of an order that has been made, the Tree Order Register managed by QCAT is an electronic register that can be searched online for free and yields the relevant information immediately.<sup>154</sup> This register shows the existence of orders affecting the land, the time for carrying out the order and the person responsible for carrying out the order.<sup>155</sup> Searches of tree applications made to QCAT are slightly more complicated and can involve requesting access in writing to the QCAT register of proceedings<sup>156</sup> (lists general details about the cases before QCAT) or the QCAT record of proceedings<sup>157</sup> (comprising documents filed in the registry for each proceeding). Fees are imposed if the person requesting the information is not a party to the proceedings. However, when measured against the cost of a sale transaction and other inquiry costs, the fees are arguably not excessive.<sup>158</sup> The QCAT Record of proceeding can be physically inspected, subject to some exceptions, although searching and accessing the record can take some time to arrange and in some cases the relevant information may not be obtained until after settlement takes place.

### 5.2.1.3. BCCM Act – disclosure statement

A seller of an existing lot in a community titles scheme or a proposed lot intended to come into existence as a lot in a community titles scheme is required to provide a disclosure statement to the buyer before the buyer enters a contract to buy the lot.<sup>159</sup> The content of the disclosure statement for an existing lot and a proposed lot varies slightly, reflecting the different nature of the property.

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<sup>153</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 83.

<sup>154</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 79(1). QCAT is required within 14 days after making an order to enter information about the order into the register: s 80(1).

<sup>155</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 79(2)

<sup>156</sup> Section 229 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) requires the principal registrar to keep a register of proceedings containing the matters stated in the rules. The matters prescribed in the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) include the number identifying the proceedings, the names of the parties to the proceedings, the final decision, and date of withdrawal if the proceedings are withdrawn.

<sup>157</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 230 requires the principal register to keep a record containing all documents filed in the registry for each proceeding.

<sup>158</sup> *Queensland Civil and Administrative Tribunal, Accessing QCAT records and information* (Version 1.2) (2013). The administrative fees associated with a third party (not a party to the proceedings) inspecting the register or the record for a proceedings is \$15 for an hour or part of an hour and \$59 for a day. Additional fees are imposed if the material must be retrieved from an off-site storage facility.

<sup>159</sup> BCCM Act s 206 (in the case of existing lots) and s 213 (in the case of a proposed lot).

For example, the disclosure statement for a proposed lot must be accompanied by the proposed community management statement.<sup>160</sup> There is no similar requirement in the case of an existing lot.

The BCCM Act requires the body corporate for a community titles scheme to keep rolls, registers and other documents and to give access to them in the manner prescribed.<sup>161</sup> In the case of the information contained in the disclosure statement for an existing lot, this information is readily accessible by the seller checking his or her own records of body corporate meetings or by undertaking a search of the body corporate records and/or by annexing a copy of the relevant register.<sup>162</sup> It is possible to obtain a certificate in relation to financial and other information about the lot, however the content of this certificate is unlikely to contain all of the information required to be included in the disclosure statement.<sup>163</sup> The prescribed fee is reasonable irrespective of whether the person inspecting the records is an owner of a lot or not.<sup>164</sup>

The information required for the disclosure statement for a proposed lot is entirely within the seller's knowledge, although it is not information that is available through searches.

## **5.2.2. Information should be of value to a buyer in making a decision to purchase**

### **5.2.2.1. GCCC Local Law**

The GCCC Local Law does intend to provide a buyer with relevant information about a significant financial liability related to the property. However, it may not provide information to the buyer about all relevant liabilities imposed under the local law. Under the GCCC Local Law, only liability in relation to a jetty, pontoon, revetment wall and training wall is required to be disclosed.<sup>165</sup> However, there are potential liabilities that may be imposed on the owner of land under sections 9 and 10 including other significant works in waterways and the construction of a work where none are in existence at the time of sale. These liabilities are not required to be disclosed.

### **5.2.2.2. Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 - tree application or order**

The disclosure of a tree application or order provides the buyer with information about ongoing financial costs and legal liability associated with the property. This is relevant to a buyer because if the seller provides the disclosure required under the Act, then:

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<sup>160</sup> The required content of a disclosure statement for an existing lot is set out in s 206(2) and in the case of a proposed lot, s 213(2) of the BCCM Act.

<sup>161</sup> BCCM Act s 204. An example of the details of what may be included in the registers and rolls is set out in the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) pt 4, ch 9.

<sup>162</sup> For example, the register of assets, the register of engagements and authorisations or the register of common property authorisations. A person with an interest in the body corporate has a right to inspect body corporate records and obtain a copy of the records kept by the body corporate: BCCM Act s 205(2).

<sup>163</sup> BCCM Act s 205(3); Sharon Christensen, *Conveyancing Manual Queensland* (Thomson, 2001) [3.580].

<sup>164</sup> The inspection fee in the case of an owner of a lot is \$14.50 and \$27.90 in the case of a person who is not an owner: *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 205(1).

<sup>165</sup> See GCCC Local Law s 15.

- in the case of a QCAT application, the buyer is joined as a party to the proceeding when the buyer enters into the contract of sale;<sup>166</sup>
- in the case of a QCAT order, the buyer becomes bound by the order after settlement.<sup>167</sup>

Orders made by QCAT in relation to trees on a property can include imposing an obligation to carry out work on the tree on an ongoing basis.<sup>168</sup>

There may also be ‘social’ costs associated with the purchase of a property the subject of a ‘neighbour’ dispute, with some buyers being reluctant to purchase a property where they are aware there is a dispute.

### 5.2.2.3. BCCM Act

The content of the disclosure statement required for an existing lot does provide a buyer with relevant information about the community titles scheme and the lot being purchased.<sup>169</sup> Buyers are then in a position to assess whether there exist any irregularities or problems with the activities and affairs of the relevant body corporate. However, there is no obligation under the Act to provide a copy of the by-laws which are included in the Community Management Statement (**CMS**). All bodies corporate in Queensland are required to have a CMS.<sup>170</sup> The by-laws are a set of rules adopted as part of a community titles scheme which broadly govern the use of common property and lots within the scheme.<sup>171</sup> They regulate such things as noise, parking, pets, garbage, damage to common property, obstruction of common property and improvements to lots.<sup>172</sup> The body corporate has an obligation to enforce the by-laws, if required.<sup>173</sup> The content of by-laws can impact significantly on the use and enjoyment of common property and place restrictions on the rights of an individual owner (or occupant) in relation to their property.<sup>174</sup> This information would be relevant to a buyer. Further, a buyer may also be interested in details of the insurance the body corporate is required to take out in relation to common property and body corporate assets and buildings in which lots are located. Details which may be relevant to a buyer include who the insurer is, the type of cover taken out and the amount and the cost of the premium. Other information which may be relevant to a buyer includes details of the balance of the administrative and sinking funds. The disclosure statement for existing lots clearly does not provide all information that might impact on the buyer’s decision to purchase a property.

The information contained in the disclosure statement for proposed lots contains information that is relevant to a buyer’s decision to purchase. However, it is also missing information that would be relevant to a buyer (see above) and the information that is provided is still in a form that is not final and not easily accessed by a buyer. The statement for a proposed lot is required to include the draft

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<sup>166</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 84.

<sup>167</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 85. The buyer is only bound to the extent that the seller has not carried out the work required by the order.

<sup>168</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 66(5)(a).

<sup>169</sup> Explanatory Memorandum, *Body Corporate and Community Management Bill 1997* (Qld) 32.

<sup>170</sup> BCCM Act ss 10, 12. The content of a Community Management Statement (**CMS**) is set out in s 66.

<sup>171</sup> BCCM Act s 168 .

<sup>172</sup> BCCM Act sch 4.

<sup>173</sup> BCCM Act s 94(1)(b).

<sup>174</sup> A copy of the CMS (which includes the by-laws) can be obtained by a search of the Titles Register.

CMS, which will contain the proposed by-laws. There is no obligation to provide details of the proposed insurer or a certificate of currency to the seller.

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

#### **5.2.3.1. GCCC Local Law**

The disclosure obligation imposed under the GCCC Local Law is the inclusion of a term in the contract of sale. There is no obligation imposed on the seller to bring the clause to the attention of the buyer at the time of signing and the clause may be overlooked by a buyer. The significance of the information is not necessarily conveyed by the contractual clause and as outlined above, may not provide a buyer with all information relevant to the decision to buy.

#### **5.2.3.2. Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 - tree application or order**

The information regarding an existing tree order is in an easily accessible form on the Tree Orders Register maintained by QCAT and available online. A certified copy of an order can be obtained from QCAT at no cost and when certified, is evidence of the information and accordingly, can be relied upon by the buyer.<sup>175</sup> The situation is slightly different in the case of an application made to QCAT. Although the register of proceedings and record of proceeding are available for inspection and copying there is a request procedure which must be followed to access the files which can take some time. The form the information takes when it is provided will generally be quite basic in the case of the register of proceedings and copies of filed documents in the case of the record of proceedings. In the case of a tree order or application, the information contained in these documents will be in a legal form and may not always be easily understood by the buyer without legal assistance. For example, in the case of a QCAT application, understanding what stage the proceedings are at and the orders being sought by the applicant is important to be able to assess the cost and impact the proceedings may have on a buyer.

#### **5.2.3.3. BCCM Act – disclosure statement**

There is no specific form prescribed under the BCCM Act for the disclosure statements for either existing or proposed lots. However, the statement will be in an accessible form and is usually a mix of buyer statements with relevant documents attached. However, in the case of a proposed lot, the statement can contain a large volume of information, some of which may not always be easily understood by a buyer.

In the case of both an existing and proposed lot, the BCCM Act expressly provides that a buyer can rely on information in the disclosure statement as if the seller had warranted its accuracy.<sup>176</sup>

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<sup>175</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ss 81(2), (3) and (4).

<sup>176</sup> BCCM Act s 208 in the case of an existing lot and s 216 in the case of a proposed lot.

## 5.2.4. A single coordinated legal framework

### 5.2.4.1. GCCC Local Law

A key impetus for establishing a seller disclosure regime is to reduce the current regulatory burden on a seller by clarifying the obligations of disclosure within a single, consistent and co-ordinated framework. Currently seller disclosure in Queensland is imposed at law, under contract and by statute. The further requirement to comply with disclosure imposed by local laws adds a further layer of complexity and cost.

Allowing local laws to impose disclosure obligations with ensuing termination rights is inconsistent with the goal of a coordinated and streamlined regulatory framework. There would be a multiplicity of problems for consumers (and their lawyers) if every local government (assuming it is within the power to regulate given by *the Local Government Act 2009* (Qld)) devised their own disclosure regime and rights of termination in default of disclosure. The creation of these rights in this manner is potentially contrary to the promotion of economic efficiency which may be achieved through a streamlined disclosure regime.

### 5.2.4.2. Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 - tree application or order

The disclosure obligation imposed under this Act is one of a number of obligations set out in a variety of Queensland legislation. As discussed in the context of the GCCC Local Law, the existence of disclosure obligations from a variety of different sources and which take different forms increases the complexity and cost of a conveyancing transaction. This is illustrated by the potential uncertainty associated with the interaction between this Act and the contractual provisions in the REIQ Contract for Houses and Residential Land (9th ed) and the Contract for Residential Lots in a Community Titles Scheme (5th ed).<sup>177</sup> Some of these issues include:

- The REIQ contractual disclosure obligations may extend beyond the statutory obligation under section 83 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld). The statutory obligation only requires disclosure of an existing application to, or order made by, QCAT before the contract is signed. However, the warranty provisions in the REIQ contracts extend to threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property.<sup>178</sup> In order to exclude the operation of the warranty, a seller would need to disclose information that may fall within the scope of that particular warranty.<sup>179</sup> Although it is not clear, presumably this might cover information about an existing dispute about a tree on the property that has not been formalised by an application to QCAT.

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<sup>177</sup> Bill Dixon 'The Neighbourhood Disputes Resolution Act 2011 (Qld) and Disclosure Issues' (2012) 32 *Queensland Lawyer* 80, 86.

<sup>178</sup> REIQ Houses and Residential Land Contract and REIQ Residential Lots in a Community Titles Scheme Contract cl 7.4(2).

<sup>179</sup> Dixon, above n 177, 86.

- There are potentially limits to what disclosure can be made given that the statutory obligation is limited to orders or applications in existence before the buyer enters the contract. The applicable contractual warranty operates at the contract date and at settlement but will not operate in relation to information that is disclosed in the contract.<sup>180</sup> The warranty does not accommodate ongoing disclosure so that any information about a tree order or application must be disclosed and included in the contract at the time it is entered in to. The warranty does not accommodate disclosure of this information after signing and before settlement.

### 5.2.4.3. BCCM Act – disclosure statement

The inclusion of a disclosure obligation in another Queensland Act is a further illustration of the current uncoordinated approach to seller disclosure in Queensland and raises similar issues to those discussed above in relation to the GCCC Local Law and the tree order and tree application disclosure obligation.

#### Questions

61. Do you think there is sufficient basis to reform the current Queensland system of seller disclosure?
62. If not, why do you think the current system should remain the same?
63. Do you agree with the reform objectives of:
  - (a) Clarifying the disclosure obligations of a seller;
  - (b) Requiring a transparent and effective form of disclosure;
  - (c) Providing information of value to the decision of a buyer to purchase;
  - (d) Balancing the information cost between buyer and seller.
64. If not, are there other or additional reform objectives that you think would assist in developing an appropriate seller disclosure regime in Queensland?
65. Do you agree with the following guiding principles as a benchmark for a seller disclosure regime in Queensland:
  - (a) 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;
  - (b) Information should be of value to a buyer in making a decision to purchase. This includes primarily information impacting on title to the property or significant financial liability arising from ownership;
  - (c) The information should be in an accessible form, easily understood and capable of being relied upon by the buyer;
  - (d) A single legal framework should be established providing consistency in the form and timing of disclosure and remedies available for a failure to comply.

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<sup>180</sup> REIQ Houses and Residential Land Contract cl 7.4(2).

**66. If not, are there other or additional principles that you think would assist in developing an appropriate seller disclosure regime in Queensland?**

**67. Do you think a seller regime which has these principles underpinning it will facilitate the creation of a disclosure regime which is simple, streamlined, cuts red tape, transparent and effective?**



## Resources

### A. Article/Books/Reports

Byrne, Mark and Reid Mortensen 'The Queensland Solicitors' Conveyancing Reservation: Past and Future Development – Part 1' (2009) 28(2) *University of Queensland Law Journal* 251

Byrne, Mark and Reid Mortensen 'The Queensland Solicitors' Conveyancing Reservation: Past and Future Development – Part 2' (2010) 29(2) *University of Queensland Law Journal* 245

Christensen, Sharon, WM Dixon, WD Duncan and S E Jones, *Land Contracts in Queensland* (The Federation Press, 3<sup>rd</sup> ed, 2011)

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## Annexure 1

### A. Statutory Disclosure Obligations in Queensland

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
<i>Environmental Protection Act 1994</i> (Qld)	s 421	Written notice that: <ul style="list-style-type: none"> <li>the particulars of the land are recorded in the environmental management or contaminated land register;</li> <li>the owner has been given notice under Part 8 of the <i>Environmental Protection Act 1994</i> (Qld) (contaminated land);</li> <li>the land is subject to an order under section 458.</li> </ul>	Before agreeing to dispose of the land.	Written notice.	Rescission Fine
	s 347	Disclosure of the existence of an approval of a transitional environmental program (relating to the place or business).	Before agreeing to dispose of the place or business.	Written notice.	Rescission Fine
	s 362	Disclosure of the existence of an Environmental Protection Order (relating to the place or business).	Before agreeing to dispose of the place or business.	Written notice.	Rescission Fine

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
<b>Queensland Building and Construction Commission Act 1991 (Qld)</b> <sup>181</sup>	s 47	Disclosure of building work and a warning in the form required by regulation if: <ul style="list-style-type: none"> <li>building work carried out on land by a person who is not licensed to carry out that building work;</li> <li>the land is offered for sale within 6 years after completion of the building work.</li> </ul>	Before the contract of sale is signed by the buyer.	Written notice.	Deemed contractual warranty that building work was properly carried out.
<b>Electrical Safety Regulation 2002 (Qld)</b> <sup>182</sup>	reg 78	Disclosure of whether an approved safety switch has been installed for the general purpose socket-outlets installed in the domestic residence on the land.	On or before the date of possession.	Written notice.	Fine
<b>Fire and Rescue Service Act 1990 (Qld)</b>	s 104RK	Disclosure of whether smoke alarms are installed in the domestic dwelling on the land.	On or before the date of possession.	Written notice.	Fine
<b>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)</b>	s 83	Disclosure of a QCAT order or application in relation to a tree located on the sale land.	Before the buyer enters into a contract of sale for the land.	Copy of QCAT order or QCAT application.	Termination Seller remains liable for any work under a QCAT order.  Fine

<sup>181</sup> This Act was previously known as the *Queensland Building Services Authority Act 1991* (Qld) but was renamed as a result of amendments made under the *Queensland Services Authority Amendment Act 2013* (Qld) which commenced on 1 December 2013.

<sup>182</sup> This Regulation will be replaced by the *Electrical Safety Regulation 2013* from 1 January 2014. The obligation to provide notice of whether there is an approved safety switch in the residence remains the same under the new Regulation, although the section numbering has changed.



Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
<b>Building Act 1975 &amp; Building Regulation 2006 (Qld)</b>	s 246ATM, s 246ATF & reg 16	Pool Safety Certificate or notice of no pool safety certificate.	Where pool safety certificate exists, before settlement.  If no certificate, notice required before entering into contract and notice must be given to the buyer before settlement.	Certificate or Form 36 Notice.	Fine
<b>Sustainable Planning Act 2009</b>  (sale of property within Milton Rail Precinct)	s 888	Seller must give notice to a buyer under a contract entered into after 17 February 2012 about: <ul style="list-style-type: none"> <li>• restrictions under s 680E; and</li> <li>• where the buyer can obtain information about the registration.</li> </ul>	Before buyer enters into contract.	Not specified	Termination at any time prior to settlement.
	s 680ZC	Seller must have the application of Chapter 8A of the Act recorded in the title (as an administrative advice).	Before the buyer enters into contract.	Approved form.	Termination at any time prior to settlement.
<b>Land Sales Act 1984</b> (sale of unregistered land)	s 9	For the sale of proposed allotment disclose: <ul style="list-style-type: none"> <li>• a disclosure plan and disclosure statement for the allotment; or</li> <li>• a copy of the plan of survey for the proposed allotment approved by the local government under the <i>Planning Act</i>.</li> </ul>	Before a contract of sale is signed by the buyer.	Documents	Avoid contract  Penalties (fine or imprisonment).  Recover money paid and any interest (if any).

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
	s 10	Disclosure of significant variations between disclosure plan and later plans.	As soon as practicable, but no later than 14 days after the seller is given the plan of survey the seller proposes to register.		Avoid contract.  Penalties (fine or imprisonment).  Recover money paid and interest (if any).
	s 10A(1)	Disclosure of a registrable instrument of transfer for the allotment no later than 18 months after the buyer enters into the contract.		Written	Avoid contract.  Penalty (fine).  Recover money paid and interest (if any).
	s 10A(3)	If the seller did not give the buyer a copy of the survey plan approved by the local government or by the MEDQ before the buyer signed the contract, then within 18 months after the buyer signed the contract the seller must give the buyer: <ul style="list-style-type: none"> <li>• a copy of the registered survey plan;</li> <li>• a copy of the as constructed plan;</li> <li>• a statement certified by a cadastral surveyor setting out the matters prescribed in the subsection (relating to variations).</li> </ul>		Documents.	Avoid contract.  Penalty (fine).  Recover money paid and interest (if any).

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
	s 21  Applies to sale of a proposed lot (BCCM Act lot)	<p>Written statement including:</p> <ul style="list-style-type: none"> <li>• identification of the lot</li> <li>• names and addresses of prospective vendor and purchaser</li> <li>• a statement as to whether the seller has represented that a certificate of title will be provided and the particulars of such representation</li> <li>• date on which it was signed.</li> </ul> <p>(This statement can be incorporated into a BCCM Act s213 disclosure statement).</p>	Before buyer enters into a contract of sale.	Written statement.	<p>Buyer may avoid contract if materially prejudiced.</p> <p>Penalties (fine or imprisonment).</p> <p>Recover money paid and interest (if any).</p>

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
	s 22	Rectification statement where the s 21 statement is not accurate at the time it is given or contains information that subsequently becomes inaccurate.	As soon as is reasonably practicable after the proposed lot has become a registered lot.	Written statement.	<p>Buyer may avoid contract if rectification statement given and buyer materially prejudiced.</p> <p>Buyer may avoid contract if seller fails to give rectification notice when required to do so and buyer materially prejudiced.</p> <p>Buyer may recover money paid and interest (if any).</p>
	ss 27 and 28 Sale of a proposed lot (BCCM Act lot)	A registrable instrument of transfer.	Within 3.5 years after the day the contract was made.	Instrument.	<p>Buyer may avoid contract unless seller's failure results from buyer's default.</p> <p>Buyer recovery of money paid (and interest, if any).</p>

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
<b><i>Building Energy Efficiency Disclosure Act 2010 (Cth)</i></b> <sup>183</sup>	Part 2 (s11 & s 15)	Provision of relevant energy efficiency information including a Building Energy Efficiency Certificate (BEEC) (which includes a NABERS Energy star rating).	BEEC – at the time the building is offered for sale.  NABERS rating – included in any advertising for the sale or lease of property.	Certificate.	Fine.
<b><i>Coastal Protection and Management Act 1995 (Qld)</i></b>	s 65	Notice of an undischarged coastal protection notice or tidal works notice.	14 days prior to settlement.	Written advice.	Sale agreement has no effect. <sup>184</sup>
<b><i>Gold Coast City Council Local Law No. 17 (Maintenance of Works in Waterway Areas) 2013</i></b>	s 15	Inclusion of information required under s15 as a term of the contract.	Prior to the buyer becoming bound by the contract.	Contract term.	Terminate.  Recovery of money paid under contract.  Fine.
<b><i>Work Health and Safety Regulations 2011 (Qld)</i></b>	s 428	Provide asbestos register to person assuming management or control of work place.	Not specified.	Register.	Fine.

<sup>183</sup> The disclosure obligation under this Act, subject to some limited exceptions, applies to ‘constitutional corporations’ that own or lease a disclosure affected building or a disclosure affected area of a building.

<sup>184</sup> Unless the buyer states an intention before settlement to settle despite the non-compliance or affirms the sale within 30 days after settlement: see s 65(5).

## B. Additional Statutory Disclosure Obligations Strata and Community Titles Schemes

Legislation	Section	Details of obligation	When must disclosure occur	Form	Remedies for non disclosure
<i>Body Corporate and Community Management Act 1997 (Qld)</i>	s 206	Disclosure statement for existing lots.	Before the buyer enters into a contract.	Written statement and attached documents.	Termination if no compliance with s 206(1). <sup>185</sup>  <b>Note:</b> termination rights are available in specific circumstances where the disclosure statement is inaccurate. <sup>186</sup>
	s 213	Disclosure statement for proposed lots.	Before the buyer enters into a contract.	Written statement and attached documents.	Termination for non compliance with s213(1). <sup>187</sup>  <b>Note:</b> termination rights are available in specific circumstances where the disclosure statement is inaccurate. <sup>188</sup>
	s 214	Variation of disclosure statement by further statement.	Before contract settles (within 14 days (or longer agreed period) from when s 214(1) starts to apply.	Written statement	Termination if the buyer would be materially prejudiced if compelled to continue the contract given the inaccuracies. <sup>189</sup>

<sup>185</sup> BCCM Act s 206(7).

<sup>186</sup> Section 209 of the BCCM Act sets out the circumstances in which a contract can be terminated (before settlement) where the disclosure statement is inaccurate and the buyer would be materially prejudiced if compelled to complete the contract or the buyer is unable to verify the information in the disclosure statement despite reasonable efforts.

<sup>187</sup> BCCM Act s 213(6)(a).

<sup>188</sup> Section 217 of the BCCM Act sets out the circumstances in which a contract can be terminated (before settlement) where the disclosure statement is inaccurate and because of the inaccuracy the buyer would be materially prejudiced if compelled to complete the contract.

<sup>189</sup> BCCM Act s 214(4).

### C. Statutory Warranties Strata and Community Title Schemes (proposed and existing lots)<sup>190</sup>

Legislation	Section	Seller warranties <sup>191</sup>	Timing	Remedies for breach
<b>Body Corporate and Community Management Act 1997 (Qld)</b>	s 223	To the seller's knowledge there are no latent or patent defects in the common property or body corporate assets other than: <ul style="list-style-type: none"> <li>• Defects arising through fair wear and tear;</li> <li>• Defects disclosed in the contract.</li> </ul>	Warranty operates as at the date of the contract.	Termination by written notice. <sup>192</sup>
		The body corporate records do not disclose any defects to which the warranty immediately above applies.		
		To the seller's knowledge, there are no actual, contingent or expected liabilities of the body corporate that are not part of the normal operating expenses, other than liabilities disclosed in the contract.		
		The body corporate records do not disclose any liabilities of the body corporate to which the warranty immediately above applies.		
		As at completion of the contract, to the seller's knowledge, there are no circumstances (other than those disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer.		

<sup>190</sup> The warranties apply to both existing and proposed lots: BCCM Act s 220. The seller should disclose information that is contrary to the warranties in s 220.

<sup>191</sup> The warranties set out in s 223 are implied in a contract for the sale of a lot: BCCM Act s223(1).

<sup>192</sup> BCCM Act s 224.

## Annexure 2

### A. REIQ Contracts for Houses and Residential Land and Lots in a Community Titles Scheme

Act and relevant section	Seller Disclosure Obligation	Included in REIQ Contract for Residential Lots in a Community Titles Scheme?	Effect of non disclosure
Reference Schedule	Seller notice to buyer that an Approved Safety Switch for the General Purpose Socket Outlet is or is not installed in the residence.	Yes	
Reference Schedule	Seller notice to buyer that a compliant smoke alarm is/are installed or are/is not installed.	Yes	
Reference Schedule	Seller gives notice in accordance with section 83 of the <i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i> (Qld) that the Land is not affected by any application to, or an order made by, QCAT in relation to a tree on the land.	Yes	
Reference Schedule	Seller gives notice that the land is affected by an application to, or an order made by, QCAT in relation to a tree on the Land, a copy of which has been given to the Buyer prior to the Buyer signing the contract.	Yes	
Reference Schedule	Pool Safety Information.	Yes	
7.2	Seller should disclose any Encumbrances Note: 'Encumbrances' include: <ul style="list-style-type: none"> <li>• Unregistered encumbrances</li> <li>• Statutory encumbrances</li> <li>• Security Interests.</li> </ul>	Yes (cl 7.2)	Terminate or affirm with remedy options as set out in clause 9.
7.4(1)	Any circumstances where the warranties in (a) – (d) about ownership and title to the land are incorrect.	Yes (cl 7.4(1))	Termination.



Act and relevant section	Seller Disclosure Obligation	Included in REIQ Contract for Residential Lots in a Community Titles Scheme?	Effect of non disclosure
7.4(2)	Details of any current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property.	Yes (cl 7.4(2))	Termination.
7.4(3)	Details of any outstanding obligation on the seller to give notice under the <i>Environmental Protection Act 1994</i> (Qld) of notifiable activity being conducted on the land and any facts or circumstances that may lead to the land being classified as contaminated under the EPA.	Yes (cl 7.4(7))	Termination or complete and claim compensation.
7.6(1)	Any valid notice or order by any competent authority or Court requiring work to be done or money spent in relation to the property.  Note: does not apply to orders disclosed under section 83 of the <i>Neighbourhood Disputes Resolution Act 2011</i> (Qld).	Yes (cl 7.6(1))	Material defect in accordance with the rule in <i>Flight v Booth</i> if the notice is not satisfied by the date of settlement.
7.6(4)	Notices under sections 246AG, 247 or 248 of the <i>Building Act 1975</i> or sections 588 or 590 of the <i>Sustainable Planning Act 2009</i> (Qld) that affect the property.	Yes (cl 7.6(4))	Terminate if any outstanding notice at the contract date that affects the property (cl 7.6(4)).
7.7(1)	Matters listed in s7.7(1) which are: <ul style="list-style-type: none"> <li>• Present use is not lawful;</li> <li>• Land is affected by a proposal of any competent authority to alter the dimensions of any transport infrastructure or locate the same on the land;</li> <li>• Access or any service to the Land passes unlawfully through other land</li> <li>• Resumption notice or intention to resume notice has been issued;</li> <li>• The property is affected by the <i>Queensland Heritage Act 1992</i> (Qld) or included in the World Heritage List</li> <li>• The property is declared acquisition land under the relevant Act.</li> </ul>	Yes (cl 7.7(1))	Termination.
8.4	Before settlement (or upon written request from the buyer) give to the buyer: <ul style="list-style-type: none"> <li>• Copies of all documents relating to any unregistered interests in the Property;</li> <li>• Full details of the Tenancies</li> <li>• Copies of all security interests or sufficient details of the security interests to enable the buyer to undertake a search of the PPSR</li> <li>• Further copies or details of those previously given cease to be complete and accurate.</li> </ul>	Yes (see cl 8.5)	Termination or affirm with remedy options as set out in clause 9.

**B. Additional Contractual Disclosure Obligations for Residential Lots in a Community Titles Scheme<sup>193</sup>**

Contract Clause No.	Seller Disclosure Obligation	Effect of non disclosure
<b>Reference Schedule</b>	Additional Body Corporate Information: <ul style="list-style-type: none"> <li>• Interest Schedule Lot Entitlement of Lot</li> <li>• Aggregate Interest Schedule Lot Entitlement</li> <li>• Contribution Schedule Lot Entitlement of Lot</li> <li>• Aggregate Contribution Schedule Lot Entitlement.</li> </ul>	
<b>Reference Schedule</b>	Insurance Policies (details)	
<b>Clause 7.4(3)</b>	<ul style="list-style-type: none"> <li>• Details of any unregistered lease, easement or other right which is required to be registered to give indefeasibility affecting the common property or Body Corporate assets;</li> <li>• Any proposal to record a new community management statement for the Scheme and any details of meeting notices of the Body Corporate to be held after the contract date or notice of any proposed resolution or a decision of the body corporate to consent to the recording of a new community management statement for the Scheme;</li> <li>• Any body corporate consents to improvements made to common property and which benefit the Lot, or the registered owner of the Lot which are not in force;</li> <li>• Any missing details from the community management statement recorded for the Scheme in relation to any allocations that affect the Lot or the registered owner of the Lot; and</li> <li>• Any incorrect additional body corporate information (if completed).</li> </ul>	Termination if materially prejudiced by the breach of the warranty – that is, the failure to disclose. The buyer cannot claim damages or compensation:(7.4(5)).
<b>8.4 Body Corporate Meetings</b>	The seller must give to the buyer copies of any notice it receives of a proposed meeting of the Body Corporate to be held after the contract date and resolutions passed at that meeting and prior to settlement.	Buyer can terminate before settlement if it is materially prejudiced by the information disclosed and specified in clause 8.4(2)(a) and (b).

<sup>193</sup> These are obligations additional to those already listed in the tables above in Table A, Annexure 2 above.

## Annexure 3

### Property to which disclosure obligations apply

Jurisdiction	Property to which disclosure obligation applies	How defined	Exclusions
NSW	Any land <sup>194</sup>	Includes tenements and hereditaments, corporeal and incorporeal, and every estate and interest whether vested or contingent, freehold or leasehold, and whether at law or in equity.	n/a
Victoria	Land <sup>195</sup>	Land of any tenure and buildings or parts of buildings (whether division is horizontal, vertical or made in any other way) and other corporeal hereditaments; and also an undivided share in land and any estate or interest in land.	n/a
South Australia	Land <sup>196</sup>	<ul style="list-style-type: none"> <li>• an interest in land; and</li> <li>• an exclusive right (whether deriving from the ownership of a share or interest in a body corporate or partnership or arising in some other way) to the separate occupation of land or a building or part of a building.</li> </ul>	n/a
	Small business <sup>197</sup>	A business to be sold for total consideration not exceeding \$200,000 or another amount as fixed by regulation.	Sale consideration is greater than \$200,000.

<sup>194</sup> *Conveyancing Act 1919* (NSW) s52A(1) and s 7. The definition will cover, amongst other things, strata units, proposed strata units under the *Strata Schemes (Freehold Development) Act 1973* (NSW) or the *Strata Schemes (Leasehold Development) Act 1986* (NSW) and lots under a community plan, precinct plan or neighbourhood plan within the meaning of the *Community Land Development Act 1989* (NSW).

<sup>195</sup> *Sale of Land Act 1962* (Vic) s 2.

<sup>196</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 3. The definition will cover a community lot or unit under the *Community Titles Act 1996* (SA) or the *Strata Titles Act 1988* (SA).

<sup>197</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 4.

Jurisdiction	Property to which disclosure obligation applies	How defined	Exclusions
<b>Tasmania</b>	Residential property <sup>198</sup>	<ul style="list-style-type: none"> <li>land on which there is a residential building; or</li> <li>residential land.<sup>199</sup></li> </ul> <p>The residential property can also be a lot within the meaning of the <i>Strata Titles Act 1998</i> (Tas).</p>	There are a long list of exclusions in s 5 of the Bill including certain option contracts, the area of the land exceeds 20 hectares or the land is predominantly used to conduct a business that does not involve the leasing of that land, and that business is being sold as part of the same transaction for the sale of that land. <sup>200</sup>
<b>ACT</b>	Residential property <sup>201</sup>	<ul style="list-style-type: none"> <li>vacant land on which the construction of residence/s (1 or more) is permitted under the territory lease; or</li> <li>land on which there is (or there is under construction) 1 or 2 residences; or</li> <li>a unit (class A or class B) as defined under the <i>Unit Titles Act 2001</i> (ACT).</li> </ul>	Land or a unit with an area more than 3 hectares.
			Land or a unit if the purpose clause in the lease permits a use other than residential or rural residential.
			A retirement village.
			An interest in a retirement village that is not a unit or a lot in a community title scheme under the <i>Community Title Act 2001</i> (ACT)
			Land where the purpose clause of the lease requires the development of the land.
	Lot included in a community title <sup>202</sup>	Lot means a parcel of land for which a certificate of title has been issued under the <i>Land Titles Act 1925</i> .(ACT).	
<b>Western Australia</b>	Lot or proposed lot	'Lot' is defined in relation to a strata scheme and also in relation to a survey-strata scheme. <sup>203</sup>	

<sup>198</sup> Residential Property Transactions Bill 2013 (Tas) cl 4.

<sup>199</sup> Residential Property Transactions Bill 2013 (Tas) cl 3. Clause 3 also defines the terms 'residential building' and 'residential land'.

<sup>200</sup> Residential Property Transactions Bill 2013 (Tas) cl 5(1)(a) and (2)(a) and (b).

<sup>201</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 6(1), 9(1) and 10.

<sup>202</sup> *Community Title Act 2001* (ACT) ss 67 and 68.

## Annexure 4

### Defects in Quality of Title Statutory Disclosure Obligations<sup>204</sup>

Obligation	NSW	SA	ACT	Vic	Tas	Qld
Planning and zoning information	Yes*	Yes	Yes	Yes	Yes	No
Building prohibitions	Yes*	Yes	No	Yes	Yes	No
Government notices, orders, certificates, declarations, undertaking or proposals affecting land	Yes^	Yes	Yes	Yes	Yes	Yes (C)
Judgments, orders or writs (or threatened) affecting property	No	Yes	Yes^	No	Yes	Yes <sup>205</sup> (C)
Proposed resumptions/acquisitions	Yes^*	Yes	No	Yes	Yes	Yes (CW)
Road widening or resiting proposals	Yes^*	No	No	Yes		Yes (C)
Building notices or orders (demolition, repair, alter)	Yes^	Yes	No	Yes	Yes	Yes (CW)
Approved plans/building approvals and conditions/Certificate of occupancy	No	Yes	Yes	No	Yes	No
Heritage/National Estate	Yes^	Yes	Yes^	No	Yes	Yes (CW)
Contaminated land	No	Yes	No	Yes	No	Yes (CW & S)
Energy efficiency rating statement	No	No	Yes	No	No	No
Building and pest reports	No	No	Yes	No	No	No
Asbestos assessment report or advice	No	Yes	Yes	No	No	No
Dividing fences	Yes^	Yes	No	No	Yes	Yes (S)
Vegetation notices and plans	Yes**^	Yes	No	No	No	No
Structural defects in building	No	No	No <sup>206</sup>	No	No	No
Mining tenement	No	Yes	No	No	No	No
Environmental protection orders and assessments	No	Yes	No	Yes	Yes	Yes (CW & S)
Access to the property via road (no right of access or right of access)	No	Yes	No	Yes	No	Yes (C)
Flood information	Yes*	No	No	No	No	No

<sup>203</sup> *Strata Titles Act 1985 (WA) s 3.*

<sup>204</sup> This table has been adapted from a table located in Christensen, above n 14, 163.

<sup>205</sup> Note the obligation to disclose QCAT orders relating to trees that affect the property.

<sup>206</sup> The Building Report required under the Australian Capital Territory disclosure regime may contain these details.

Obligation	NSW	SA	ACT	Vic	Tas	Qld
Encroachments	Yes <sup>^</sup>	No	No	No	No	No
Contribution plans, rates, taxes, charges, levy etc affecting the land	Yes <sup>*</sup>	Yes	No	Yes	No	Yes (S) <sup>207</sup>
Coastal protection issues	Yes <sup>**^</sup>	No	No	No	No	Yes (C & S)
Mining subsidence	Yes <sup>*</sup>	No	No	No	No	No
Tree orders or application for an order	Yes <sup>^*</sup>	No	No	No	No	Yes (C & S)
Declared landslip area (unstable sloping sites)	No	No	No	No	Yes	No
Grave on the land	No	No	No	No	Yes	No
Water licence/water allocation	Yes <sup>^</sup>	Yes	No	No	No	No
Bush fire prone land	Yes <sup>*</sup>	No	No	Yes	No	No
List of services connected to the land	No	No	No	Yes	Yes	No
Sewerage and water supplies below the standard in the locality	No	No	No	Yes	No	No
Biodiversity/threatened species	Yes <sup>^</sup>	No	No	No	No	No

\* This information is obtained through the issue of a certificate under s 149 of the *Environmental Planning and Assessment Act 1979* (NSW)

<sup>^</sup> The obligation is in the form of a statutory warranty.

**C** Contractual obligation

**CW** Contractual warranty

**S** Statutory obligation

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<sup>207</sup> BCCM Act. See further details in the table setting out the additional disclosure obligations in relation to strata and community title lots.

## Annexure 5

### Defects in Quality of Title Additional Statutory Disclosure Obligations for Strata and Community Title Lots

Obligation	NSW <sup>208</sup>	SA <sup>209</sup>	ACT <sup>210</sup>	Vic <sup>211</sup>	Tas <sup>212</sup>	WA <sup>213</sup>	Qld
By-laws/articles	Yes	Yes	No	Yes	Yes	Yes	No
Proposed by-laws	No	No	No	No	No	Yes	Yes
Community management statement/precinct management statement/strata management statement/neighbourhood management statement or proposed statement	Yes	No	No	No	No	No	Yes <sup>214</sup>

<sup>208</sup> Under the *Strata Schemes Management Act 1996* (NSW) an owner or someone with the owner's or mortgagee's permission can write to an owners corporation and request a certificate under s 109. This certificate provides information about any special by-laws, the levies to be paid by the owners, any outstanding levies and the address where records and financial information can be viewed. A similar certificate is available under s 26 of the *Community Land Management Act 1989* (NSW).

<sup>209</sup> In addition to the information set out in this table relevant to the sale of a community lot or a strata unit, the disclosure provisions in the *Land and Business (Sale and Conveyancing) Act 1994* (SA) and the *Land and Business (Sale and Conveyancing) Regulations 2010* (SA) require a notice to be included in the statement. The notice is prescribed and is set out in Division 3 of the Schedule of Form 1 and includes general information about what it means to purchase a community lot or strata unit including matters about governance, the use that a purchaser can make of the property purchased, unpaid contributions, expenses, guaranteeing liabilities of the body corporate and issues associated with buying off the plan. A buyer can also request information from a community corporation or strata corporation about the current financial position of the corporation (and other specified information) under the *Community Titles Act 1996* (SA) ss 139 and 140 and the *Strata Titles Act 1988* (SA) s 41.

<sup>210</sup> *Unit Titles Act 2001* (ACT) and *Unit Titles (Management) Act 2011* (ACT) set out the framework for strata title property, including the management entity, in the ACT. However, all seller disclosure obligations previously located in the *Unit Titles Act 2001* have been moved into the *Civil Law (Sales of Residential Property) Act 2003* (ACT). This can be compared to the *Community Title Act 2001* (ACT) which has retained the additional seller disclosure obligations relevant to a community title lot. The obligations identified in this table relate to community title obligations under section 68 of the *Community Title Act 2001* (ACT). Additional disclosure obligations are imposed under the *Civil Law (Sales of Residential Property) Act 2003* (ACT) in relation to units but these relate to quality of title.

<sup>211</sup> Section 32(3A) of the *Sale of Land Act 1962* (Vic) requires a seller to provide a copy of the current owners corporation certificate issued under the *Owners Corporations Act 2006* (Vic) and the required accompanying documents. The content of the certificate is set out in s 151(4) of the *Owners Corporations Act 2006* (Vic).

<sup>212</sup> These obligations relate to residential property which is also a lot as part of a strata scheme within the meaning of the *Strata Titles Act 1998* (Tas). The *Strata Titles Act 1998* (Tas) has a separate Part dealing with the establishment and management of community development schemes (Part 4).

<sup>213</sup> These obligations are set out in the *Strata Titles Act 1985* (WA), s 69A. Additional 'notifiable information' is required to be disclosed by the seller if the conditions in s 69B(1) are met. For further details of the notifiable information, see section 69B(2).

Obligation	NSW <sup>208</sup>	SA <sup>209</sup>	ACT <sup>210</sup>	Vic <sup>211</sup>	Tas <sup>212</sup>	WA <sup>213</sup>	Qld
Insurance	Yes <sup>215</sup>	Yes	No	Yes	Yes	No	No <sup>216</sup>
Details of the secretary or manager of the body corporate	No	No	Yes	Yes	Yes	No	Yes
Annual lot contributions payable <sup>217</sup>	No	Yes	Yes	Yes <sup>218</sup>	Yes	No	Yes
Proposed annual lot contributions	No	No	No	Yes	No	No	Yes
Unpaid contributions outstanding	No	Yes	No	Yes	Yes	No	No
Details of unit or lot entitlements	No	Yes	No	No	No	Yes	No
Details of proposed unit or lot entitlements	No	No	No	No	No	Yes	Yes
Actual, contingent or expected liabilities beyond normal operating expenses etc	No	Yes	No	Yes	Yes	No	Yes <sup>219</sup>
All resolutions made at the last AGM of the owner's corporation	No	No	No	Yes	No	No	No
Amount of any liability (apart from contributions) that remains outstanding from the owner	No	No	No	No	Yes	No	No
Notices and orders served on the owner's corporation	No	No	No	Yes	No	No	No
Information on any legal action to which the body corporate is party	No	No	No	Yes	Yes		
Copies of minutes of general meetings of the body corporate/community corporation/management committee	No	Yes	Yes <sup>220</sup>	No	No	No	No

<sup>214</sup> In the case of a proposed lot, the proposed Community Management Statement is required to be disclosed under s 213.

<sup>215</sup> Although this information is included as part of the by-laws in the case of a lot in a community scheme, neighbourhood scheme or precinct scheme and relates only to insurance of neighbourhood property or community property. Further details about insurances can be accessed through inspecting the relevant records.

<sup>216</sup> Note the 'Insurance Policies' information required in the Reference Schedule to the REIQ Contract for Residential Lots in a Community Titles Scheme.

<sup>217</sup> In some jurisdictions, a seller is required to disclose the unit entitlement of every lot within the scheme and the aggregate unit entitlement. See for example the *Strata Titles Act 1985* (WA) s 69A(c).

<sup>218</sup> The terms used in the *Owners Corporation Act 2006* (Vic) are 'fees and charges that are imposed or proposed to be imposed on the lot' (see s 151(4)(ii)).

<sup>219</sup> This is in the form of a statutory warranty in Queensland.

<sup>220</sup> Required for a residence that is a class A unit under *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(h)(v).



Obligation	NSW <sup>208</sup>	SA <sup>209</sup>	ACT <sup>210</sup>	Vic <sup>211</sup>	Tas <sup>212</sup>	WA <sup>213</sup>	Qld
Information about any funds of the body corporate administered by it (including expenditure and liabilities/statement of accounts)	No	Yes	No	Yes	Yes	No	No
Improvements on common property of the scheme for which the seller is responsible	No	No	Yes	No	No	No	Yes
Repairs and maintenance	No	No	No	Yes	No	No	No
Information regarding the common property (eg contracts, leases or licences affecting the property)	No	No	No	Yes	No	No	No
Assets	No	Yes	No	No	No	No	Yes
Existence of a body corporate committee or manager engaged to perform committee functions	Yes	No	No	No	No No	No	Yes
Latent or patent defects in common property or body corporate assets	No	No	No	No	No	No	Yes (warranty)

## Annexure 6

### A. Statutory Remedies (Jurisdictions)

Jurisdiction	Circumstances giving rise to remedy	Statutory Remedy	Pre-conditions to availability of remedy	When remedy unavailable	Timing
NSW	<ul style="list-style-type: none"> <li>Failure to attach the prescribed disclosure documents to the contract; or</li> <li>Breach of the warranty section 52A(2)(b) of the <i>Conveyancing Act 1919</i> (NSW).</li> </ul>	Rescission <sup>221</sup>	<ul style="list-style-type: none"> <li>Breach constitutes a failure to disclose to the buyer the existence of a matter affecting the land; and</li> <li>The buyer was unaware of the existence of the matter when the contract was entered into; and</li> <li>The buyer would not have entered into the contract had she or he been aware of the matter.<sup>222</sup></li> </ul>		<p><u>Failure to attach the prescribed documents</u></p> <p>Within 14 days after the making of the contract, unless the contract has been completed.</p> <p><u>Breach of warranty section</u></p> <p>At any time before the contract is completed.<sup>223</sup></p>

<sup>221</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) reg 16(1).

<sup>222</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) reg 16(3).

<sup>223</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) reg 17(1).

Jurisdiction	Circumstances giving rise to remedy	Statutory Remedy	Pre-conditions to availability of remedy	When remedy unavailable	Timing
<b>Vic</b>	<ul style="list-style-type: none"> <li>Supplying false information to the purchaser in the required statements or certificates; or</li> <li>Fails to give all the information required.<sup>224</sup></li> </ul>	Rescission <sup>225</sup>		Remedy unavailable if the court is satisfied: <ul style="list-style-type: none"> <li>The seller acted honestly and reasonably; and</li> <li>ought to be excused for the contravention; and</li> <li>that the purchaser is substantially in as good a position as if the seller had complied with his or her disclosure obligations.<sup>226</sup></li> </ul>	Before purchaser accepts title.
<b>SA</b>	<ul style="list-style-type: none"> <li>Failure to give seller statement; or</li> <li>Failure to certify it; or</li> <li>the statement given is defective.</li> </ul>	Seller can apply to the Court for an order. <sup>227</sup>	<p>Court needs to be satisfied that buyer has been prejudiced by failure to comply with the disclosure obligation.</p> <p>Defence to criminal offence or civil proceedings available.<sup>228</sup></p>		Not specified.

<sup>224</sup> See ss 32(5)(a) and (b) *Sale of Land Act 1962* (Vic). An additional right to rescind the contract is available where a notice to acquire land has been issued in relation to the land and the buyer has not accepted title: see s 32(5A).

<sup>225</sup> If the seller supplies false information or fails to supply the information knowingly or recklessly, he or she will be guilty of an offence and subject to a fine: *Sale of Land Act 1962* (Vic) s 32(6).

<sup>226</sup> *Sale of Land Act 1962* (Vic) s 32(7).

<sup>227</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 15(2). It is also an offence to contravene or not comply with a disclosure obligation and the relevant offender will be subject to a fine: *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 14.

<sup>228</sup> See *Land and Business (Sale and Conveyancing) Act 1994* (SA), s 16. Defences include that the seller can prove the failure to comply was not intentional and did not occur by reason of the seller's negligence.

Jurisdiction	Circumstances giving rise to remedy	Statutory Remedy	Pre-conditions to availability of remedy	When remedy unavailable	Timing
<b>Tas</b>	Contract of sale fails to comply with the Part. <sup>229</sup>	Rescission <sup>230</sup>	<ul style="list-style-type: none"> <li>The disclosure document that is omitted concerns the existence of a matter affecting or relating to the property; and</li> <li>The buyer was unaware of the matter when the contract was entered into; and</li> <li>The purchaser would not have entered into the contract had he or she been aware of the existence of the matter.<sup>231</sup></li> </ul>		<p>If the seller gives notice of the matters which do not comply with the disclosure obligations, the earlier of:</p> <ul style="list-style-type: none"> <li>5 business days after giving the notice; or</li> <li>The date of completion of the contract.</li> </ul> <p>If no notice is given, before the date of completion.<sup>232</sup></p>
<b>ACT</b>	Failure to provide 'required documents' for inspection.	Fine <sup>233</sup>			Before completion of contract.

<sup>229</sup> There are additional rescission rights under the Residential Property Transactions Bill 2013 (Tas) (see for example cl 13-16).

<sup>230</sup> Residential Property Transactions Bill 2013 (Tas) cl 9(1). It is an offence not to comply with the relevant disclosure obligations. There is a defence available to the seller where he or she reasonably believed that a property agent, legal practitioner etc was responsible for ensuring the contract complied with the requirements: Residential Property Transactions Bill 2013 (Tas) cl 10. It is also an offence to provide false or incorrect disclosure documents: cl 11. An offender will be subject to a fine.

<sup>231</sup> Residential Property Transactions Bill 2013 (Tas) cl 9(2).

<sup>232</sup> Residential Property Transactions Bill 2013 (Tas) cl 9(3).

<sup>233</sup> This is a strict liability offence: *Civil Law (Sale of Residential Property) Act 2003 s 10(1) and (3)*.

Jurisdiction	Circumstances giving rise to remedy	Statutory Remedy	Pre-conditions to availability of remedy	When remedy unavailable	Timing
	Breach of implied contractual condition that the property is sold free of encumbrances and buyer is entitled to vacant possession. <sup>234</sup>	Rescind or complete contract and claim damages. <sup>235</sup>			Before completion of contract.
	Breach of condition that there are no unapproved structures (before completion of contract). <sup>236</sup>	Rescind or complete contract and claim damages (if not approved before completion). <sup>237</sup>			Before completion of contract.
	Error in the description of the property (before completion of the contract). <sup>238</sup>	If error material, rescind contract <u>or</u> complete contract and claim damages. <sup>239</sup>  If error not material, complete the contract and claim damages. <sup>240</sup>			Before completion of contract.

<sup>234</sup> *Civil Law (Sale of Residential Property) Act 2003* s 11(1)(a).

<sup>235</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(b).

<sup>236</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(c).

<sup>237</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(d).

<sup>238</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(h).

<sup>239</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(b)(ii)(A).

<sup>240</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(h)(ii)(B).

## B. Additional Remedies Strata and Community Title (Jurisdictions)

Jurisdiction	Circumstances giving rise to remedy	Statutory Remedy	Pre-conditions to availability or unavailability of remedies	Timing
WA	<ul style="list-style-type: none"> <li>Failure to provide buyer with the disclosure information that substantially complies with s 69; or</li> <li>Failure to provide buyer with the notifiable variations under s 69C.<sup>241</sup></li> </ul>	Avoid contract.		Before settlement.
	<ul style="list-style-type: none"> <li>Failure to provide buyer with the notifiable variations under s 69C.<sup>242</sup></li> </ul>	Avoid contract.	In the case of failing to comply with s 69C: <ul style="list-style-type: none"> <li>If notifiable variation information given to buyer; and</li> <li>Buyer is materially prejudiced by any matter; and</li> <li>has not agreed to be bound by the matter.</li> </ul>	Within 7 working days after that information is given. <sup>243</sup>
ACT	Failure to provide the buyer the disclosure statement. <sup>244</sup>	Rescission.	<ul style="list-style-type: none"> <li>The seller has not complied with all of the subsections; and</li> <li>Settlement has not taken place.</li> </ul>	Before settlement.

<sup>241</sup> *Strata Titles Act 1985* (WA) s 69D(1).

<sup>242</sup> *Strata Titles Act 1985* (WA) s 69D(1).

<sup>243</sup> *Strata Titles Act 1985* (WA) s 69D(2).

<sup>244</sup> *Community Title Act 2001* (ACT) s 67(1). The details of what must be included in the statement, how it is attached to the contract and other relevant information is contained in ss 67(2)-(5) of the Act.

## Annexure 7

### Statutory contracting out provisions (Jurisdictions)

Jurisdiction	Does the legislation allow for contracting out of disclosure obligations?	Details of provision which either permits or prohibits contracting out	Consequences
<b>NSW</b>	No	Expressly prohibited, except to the extent regulations may otherwise provide. <sup>245</sup>	Provision of relevant contract or agreement is void.
<b>Vic</b>	No	Expressly prohibited. <sup>246</sup>	Provision in a contract for the sale of land is void and of no effect.
<b>SA</b>	No	Expressly prohibited. <sup>247</sup>	Relevant exclusion, modification, waiver etc is void.
<b>Tas</b>	Yes	Qualified prohibition subject to exceptions: <ul style="list-style-type: none"> <li>• The buyer received advice from legal practitioner or conveyancer before entering into the contract; and</li> <li>• The legal practitioner or conveyancer is not acting for the seller; and</li> <li>• The legal practitioner or conveyancer gives a written certificate to the buyer before entering ; and</li> <li>• A copy of that certificate is included in the contract or agreement.<sup>248</sup></li> </ul>	Contract provision or agreement etc is void. <sup>249</sup>
<b>ACT</b>	No	Expressly prohibited. <sup>250</sup>	Relevant provision of the contract or agreement void.

<sup>245</sup> *Conveyancing Act 1919*(NSW) s 52A(4).

<sup>246</sup> *Sale of Land Act 1962* (Vic) s 32(8).

<sup>247</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 33.

<sup>248</sup> Residential Property Transactions Bill 2013 (Tas) cl 27(2).

<sup>249</sup> Residential Property Transactions Act 2013 (Tas) cl 27(1).

<sup>250</sup> *Civil Law (Sales of Residential Property) Act 2003* (ACT) s 36.

## Annexure 8

### Exclusion categories (Jurisdictions)

Exclusion Category	NSW	Vic	ACT <sup>251</sup>	SA	WA	Tas <sup>252</sup>
Mortgagee sales	-	-	Yes <sup>253</sup>	-	-	-
Sale by Court order	-	-	Yes <sup>254</sup>	-	-	-
Sale by registered or official trustee, or other official receiver under the <i>Bankruptcy Act 1966</i> (Cth)	-	-	Yes <sup>255</sup>	-	-	-
Contract of sale arising from the exercise of an option to purchase the property.	Yes <sup>256</sup>	-	-	-	-	Yes <sup>257</sup>
A contract between owners of adjoining lands that will result solely in an adjustment of common boundary.	Yes <sup>258</sup>	-	-	-	-	-

<sup>251</sup> The exclusions in the *Civil Law (Sales of Residential Property) Act 2003* (ACT) extend only to specific warranties which take effect at the date the contract is made and at the date the contract is completed relating to unsatisfied judgments, orders or writs or threatened or current claims etc that could lead to such judgments which impact on the property. There is an additional warranty excluded at the date the contract is complete that the seller will be, or will be able to be, the registered proprietor of the Territory lease. Two required documents, the building conveyancing inquiry documents and building and compliance inspection report, are not required to be disclosed in the case of a class A unit or a residence that has not previously been occupied or sold as a dwelling or an off the plan purchase. Similarly, a pest inspection report is not required to be disclosed for a class A unit: s 9(2)).

<sup>252</sup> There are other exclusions set out in clause 5 of the Residential Property Transactions Bill 2013 (Tas) which are not included in this table.

<sup>253</sup> *Civil Law (Sales of Residential Property) Act 2003* (ACT) s 11(2).

<sup>254</sup> *Civil Law (Sales of Residential Property) Act 2003* (ACT) s 11(2).

<sup>255</sup> *Civil Law (Sales of Residential Property) Act 2003* (ACT) s 11(2).

<sup>256</sup> *Conveyancing Act 1919* (NSW) s 52A(5) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 4, pt 2, Item 8-10. The options include an option that is contained in a will or lease.

<sup>257</sup> The relevant option in the case of the Residential Property Transactions Bill 2013 (Tas) is contained in a will or in a residential tenancy agreement, or the period for the exercise of the option by the buyer was longer than 60 days or the option was granted before the commencement of the section: cl 5(a).

<sup>258</sup> *Conveyancing Act 1919* (NSW) s 52A(5) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 4, pt 1, Item 1.



Exclusion Category	NSW	Vic	ACT <sup>251</sup>	SA	WA	Tas <sup>252</sup>
<b>A contract between co-owners providing for the acquisition by one or more co-owners of the whole or any part of the share or interest of any other co-owner.</b>	Yes <sup>259</sup>	-	-	-	-	-
<b>Contracts of sale under other legislation</b>	Yes <sup>260</sup>	-	-	-	-	-
<b>An estate or interest created by or subsisting by virtue of a mortgage, easement, permissive occupancy or profit a prendre.</b>	Yes <sup>261</sup>	-	-	-	-	-
<b>The disclosure legislation/provision is excluded under the contract.</b>	-	-	-	-	-	Yes <sup>262</sup>
<b>The buyer is a related person of the buyer and the contract includes a provision excluding the Act for that reason.</b>	-	-	-	-	-	Yes <sup>263</sup>
<b>Contract for the sale of a share/s in a company that confers on the owner of the share/s an exclusive right to occupy part of a building on land owned by the company.</b>	-	-	-	-	-	Yes <sup>264</sup>
<b>An interest under a lease other than certain excluded ones.</b>	Yes <sup>265</sup>	-	-	-	-	-
<b>Purchase price exceeds a prescribed amount and the purchase is primarily for investment purposes</b>	-	-	-	-	-	Yes <sup>266</sup>
<b>Contract is for sale of three or more residential properties by the same seller to the same buyer</b>	-	-	-	-	-	Yes <sup>267</sup>

<sup>259</sup> *Conveyancing Act 1919* (NSW) s 52A(5) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 4, pt 1, Item 2.

<sup>260</sup> *Conveyancing Act 1919* (NSW) s 52A(5) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 4, pt 1, Item 3. For example, a sale of a former public road pursuant to sections 42 or 43 of the *Roads Act 1993* (NSW) or a contract for the sale of land entered into by the Minister administering the *Environmental Planning and Assessment Act 1979* (NSW) pursuant to section 9 of that Act.

<sup>261</sup> *Conveyancing Act 1919* (NSW) s 52A(5) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 4, pt 5, Item 15.

<sup>262</sup> Residential Property Transactions Bill 2013 (Tas) cl 5(3) and 27.

<sup>263</sup> Residential Property Transactions Bill 2013 (Tas) cl 5(1)(c).

<sup>264</sup> Residential Property Transactions Bill 2013 (Tas) cl 5(5).

<sup>265</sup> *Conveyancing Act 1919* (NSW) s 52A(5) and *Conveyancing (Sale of Land) Regulation 2010* (NSW) sch 4, pt 5, Item 16. Excluded leases include, for example, a lease of Crown land having an unexpired term of more than 5 years or a lease of a lot within the meaning of the *Strata Schemes (Leasehold Development) Act 1986* (NSW) or a perpetual lease or other lease from the Crown having an unexpired term of more than 5 years.

<sup>266</sup> Residential Property Transactions Bill 2013 (Tas) cl 5(1)(d).

<sup>267</sup> Residential Property Transactions Bill 2013 (Tas) cl 5(1)(d).