

2016

# Interim Report: Seller Disclosure in Queensland

Commercial and Property Law

Research Centre

QUT Law

## Preface

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

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# Interim Report: Seller Disclosure in Queensland

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## Attorney-General's foreword

Buying and selling property can be a challenging process for all the parties.

While buyers and sellers may approach a potential sale from different perspectives, they have a common interest in making the transaction as smooth, efficient and free from disputes as possible.

The legal framework can play a critical role in promoting greater certainty and transparency in property transactions and ensuring that the rights and interests of both buyers and sellers are fairly balanced as they navigate the various stages of a sale.

One of the early challenges is in bridging the information gap between buyers and sellers about the range of factors that may influence a buyer's decision to buy.

In Queensland, there is currently no single, formal framework for the seller's disclosure obligations. The obligations arise from a range of sources – statute, contract, local government laws and the common law - and arise at different times in the conveyancing process.

Opportunities for reforming the current seller disclosure regime are part of a broad review of Queensland's property laws being undertaken by the Queensland University of Technology (QUT) Commercial and Property Law Research Centre.

The *Interim Report: Seller Disclosure in Queensland*, which I release today, draws on the submissions received in response to an earlier Issues Paper and provides a further opportunity for community input on this issue.

The Queensland Government values the expert knowledge and experience which the QUT brings to the review of this complex area of the law.

The Government is pleased to be joining with QUT in this endeavour and thanks QUT's Commercial and Property Law Research Centre for its ongoing work on the property law review.

I invite interested members of the public and stakeholders to consider the Interim Report and would welcome submissions to assist QUT in settling its final recommendations.

**Hon Yvette D'Ath**

**Attorney-General and Minister for Justice and Minister for Training and Skills**



**Hon Yvette D'Ath**  
**Attorney-General and Minister**  
**for Justice and Minister for**  
**Training and Skills**

## How to make a submission

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

The closing date for submissions is 16 August 2016.

### ***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.

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## Executive Summary

This Interim Report has been prepared following consideration of the submissions received in response to the Property Law Review Issues Paper – Seller Disclosure in Queensland which was released for public consultation on 12 February 2014. The Issues Paper identified a variety of difficulties associated with the current seller disclosure regime that impede its effectiveness in Queensland. The submissions received following the consultation process reinforce that these issues are ‘live’ and do create problems during the conveyancing process.

The submissions uniformly support the introduction of a statutory disclosure regime or a regime that will result in better coordination of the conveyancing process. This Report makes a number of recommendations about the seller disclosure regime in Queensland, including recommending the introduction of a statutory seller disclosure regime applicable to all freehold land. The recommendations do not fundamentally change the information which is currently required to be disclosed in Queensland. However, the effect of the proposed statutory regime is to:

- Incorporate most disclosures into a single location in the *Property Law Act 1974* (Qld) (**PLA**) in the form of statutory warranties. Disclosures specific to lots in community titles schemes will remain within the *Body Corporate and Community Management Act 1997* (Qld) (**BCCM Act**);
- Change the way in which the existing disclosures are made through the use of a seller statement and body corporate certificate;
- Add a limited number of new disclosures, all of which should be within the knowledge of the seller or easily accessible by the seller at a reasonable cost; and
- Require earlier disclosure for the sale of residential property – that is, from the point that the property is offered for sale.

This proposed approach to seller disclosure is consistent with the following reform objectives identified in the Issues Paper:

- Clarifying the disclosure obligations of a seller;
- Requiring a transparent and effective form of disclosure;
- Providing information of value to the decision of a buyer to purchase; and
- Balancing the information cost between buyer and seller.

Achieving these objectives will provide a more effective sale and conveyancing process in Queensland.

The 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 proposed statutory seller disclosure regime set out in this Report.



## Recommendations

Recommendation 1	A statutory seller disclosure regime should be introduced in Queensland.
Recommendation 2	<p>The following guiding principles will be used as a benchmark for the seller disclosure regime:</p> <ul style="list-style-type: none"> <li>• 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;</li> <li>• 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;</li> <li>• The information should be in an accessible form, easily understood and capable of being relied upon by the buyer; and</li> <li>• A single legal framework should be established providing consistency in the form and timing of disclosure and remedies available for a failure to comply.</li> </ul>
Recommendation 3	The seller disclosure regime should apply to all freehold land, subject to exclusions. (Option 1)
Recommendation 4	Auctions and all options (including put and call options) to purchase land should be subject to the statutory seller disclosure regime.
Recommendation 5	The current disclosure obligations under the BCCM Act, <i>Land Sales Act 1984</i> (Qld) and the <i>Building Units and Group Titles Act 1980</i> (Qld) should remain in substantially the same form.
Recommendation 6	The form of the seller disclosure in Queensland should be a seller statement as described in Option 4 – 'seller statement which only lists exceptions to the warranties along with a copy of the title'. Copies of some documents may need to accompany the statement, where appropriate.
Recommendation 7	<p>The form of the seller statement should be prescribed and must be a simple, tabulated document in either the form proposed in Attachment D or which:</p> <ul style="list-style-type: none"> <li>• Enables the seller to understand the warranties that he or she is providing and the need to disclose information where the relevant warranty cannot be given; and</li> <li>• Is easily understood by the buyer.</li> </ul>
Recommendation 8	Information relevant to community title lots should be provided in the form of a Body Corporate Certificate. This certificate will accompany the seller statement when provided and will replace the disclosure statement required under section 206 of the BCCM Act and the body corporate certificate which is available under section 205 upon request.
Recommendation 9	The seller statement and, where applicable, the body corporate certificate must be available to prospective buyers of residential property from the time the property is offered for sale (Option 2).
Recommendation 10	The seller must provide a copy of the seller statement, and where applicable, the body corporate certificate to the buyer prior to a contract being entered into. The seller is not required to provide disclosure twice.
Recommendation 11	In the case of a dispute, the onus of proving that the seller complied with the statutory disclosure obligation should rest with the seller (Option 3).

Recommendation 12	The information which is currently required to be disclosed in Queensland should be retained under a statutory disclosure regime.
Recommendation 13	A mandatory seller commissioned pest and building inspection report should not be introduced as a statutory disclosure obligation in Queensland.
Recommendation 14	Flooding information should not be introduced as a statutory disclosure obligation.
Recommendation 15	Building approval information should not be required as a statutory disclosure obligation.
Recommendation 16	A seller should be required to disclose the following additional information: <ul style="list-style-type: none"> <li>• Vegetation Protection Order details;</li> <li>• Services infrastructure (electricity, water and sewerage) connected to the land;</li> <li>• Resource authority and access, conduct and compensation agreements affecting the land; and</li> <li>• Details of State Heritage Register and Local Heritage Register entries.</li> </ul>
Recommendation 17	The body corporate certificate should also include the following additional information: <ul style="list-style-type: none"> <li>• By-laws (including exclusive use by-laws);</li> <li>• Notice of resumption of common property;</li> <li>• Additional Insurance information including the amount of cover, the period of cover and details of any current or outstanding claims made under the policy; and</li> <li>• Information specific to the body corporate such as whether it is involved in litigation (and adjudication), received a show cause or enforcement notice or a notice or order requiring work to be done or money spent in relation to the scheme.</li> </ul>
Recommendation 18	Seller disclosure in Queensland should only occur within the framework of the statutory regime proposed under the PLA (and the BCCM Act). Any future revisions or additions should occur within this framework.
Recommendation 19	The buyer may rely on information in the disclosure statement as if the seller had warranted its accuracy
Recommendation 20	The statutory disclosure regime in Queensland should not require continuing disclosure.
Recommendation 21	A seller who becomes aware of an inaccuracy in the seller statement (or body corporate certificate) is able to rectify the inaccuracy by appropriate disclosure in the contract.
Recommendation 22	Failure by the seller or agent to make the seller statement available from the time the residential property is offered for sale is an offence.
Recommendation 23	A defence or excuse to the offence proposed in Recommendation 22 may arise: <ul style="list-style-type: none"> <li>• in related party transactions – such as parent and subsidiary companies or partnerships;</li> <li>• in Court ordered sales – for example, a Family Court ordered sale or a sale by the Sheriff;</li> <li>• where the prospective buyer is the State or statutory body; and</li> <li>• where the prospective buyer is a publicly listed company.</li> </ul>

Recommendation 24	Rescission should only be available for 21 days after the contract has been entered into or up to the time of settlement, whichever is earlier.
Recommendation 25	A buyer has an unfettered right to rescind if the seller fails to provide the seller statement required under the legislation.
Recommendation 26	Where rescission arising under Recommendation 25 occurs, the seller disclosure provision should expressly provide for the return of any money paid by the buyer in relation to the conveyance. Any outstanding money should be deemed recoverable as a debt.
Recommendation 27	A buyer is entitled to rescind the contract where a statutory warranty has been breached by the seller, subject to the limits imposed under Recommendation 28.
Recommendation 28	The buyer's right to rescind for a breach of a statutory warranty is only available if: <ul style="list-style-type: none"> <li>• The breach constitutes a failure to disclose to the buyer the existence of the matter affecting the land;</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.</li> </ul>
Recommendation 29	Where rescission arising under Recommendation 27 occurs, the seller disclosure provision should expressly provide for the return of any money paid by the buyer in relation to the conveyance. Any outstanding money should be deemed recoverable as a debt.
Recommendation 30	A deeming provision be included in the statutory seller disclosure regime with the effect that the failure to disclose in the seller statement information regarding: <ul style="list-style-type: none"> <li>• Undischarged coastal protection or tidal works notice;</li> <li>• Contaminated land recorded in the environmental register and other disclosures required under the <i>Environmental Protection Act 1994</i> (Qld);</li> <li>• Tree applications and orders under the <i>Neighbourhood Disputes (Dividing Fences and Trees) Act 2011</i> (Qld);</li> <li>• A proposal by an authority to alter the dimensions of any transport infrastructure or locate transport infrastructure on the land;</li> </ul> is either: <ul style="list-style-type: none"> <li>• Non-disclosure of the seller statement; or</li> <li>• Automatically satisfies the threshold test for rescission in Recommendation 28.</li> </ul> <p>The buyer in this situation will be able to rescind the contract with no further qualification.</p>
Recommendation 31	Contracting out of the statutory seller disclosure regime is expressly prohibited and any provision to this effect in a contract for the sale of land is void and of no effect.
Recommendation 32	Exclusion categories should be included into the disclosure regime. These are: <ul style="list-style-type: none"> <li>• in related party transactions – such as parent and subsidiary companies or partnerships;</li> <li>• in Court ordered sales – for example, a Family Court ordered sale or a sale by the Sheriff;</li> </ul>

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	<ul style="list-style-type: none"><li>• where the prospective buyer is the State or statutory body; and</li><li>• where the prospective buyer is a publicly listed company.</li></ul>
<b>Recommendation 33</b>	Further investigation of the potential to develop a 'one-stop shop' for state and local government disclosure information should be undertaken.
<b>Recommendation 34</b>	A statutory disclosure regime comprising a number of statutory warranties, disclosure of a seller statement and body corporate certificate (where applicable) be enacted in Queensland.

## 1. Background

### 1.1. Review of Queensland Property Laws

On 12 February 2014 the former Queensland Government released the Property Law Review Issues Paper 1: Seller Disclosure in Queensland (**Issues Paper**) for public consultation. The paper was prepared by the Commercial and Property Law Research Centre (**Centre**) at the Queensland University of Technology (**QUT**) and forms part of the broader review of Queensland property laws which, in addition to seller disclosure, encompasses:

- Setting, adjustment and review of lot entitlements for community titles schemes under the BCCM Act. This component of the review is considered in detail in Issues Paper 2: Lot Entitlements released on 12 February 2014 for public consultation;
- Governance issues associated with community titles schemes under the BCCM Act; and
- Consideration of options for modernising, simplifying and clarifying the *Property Law Act 1974* (Qld) (**PLA**).

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

Public consultation closed on 21 March 2014. This Interim Report has been prepared after analysis of the matters listed above and the submissions received in response to the Issues Paper. This Report makes a number of recommendations and proposes an alternative framework for seller disclosure in Queensland.

### 1.2. A need for reform - submissions in response to the Seller Disclosure Issues Paper

Six submissions were received in response to the Issues Paper. The peak industry responses were received from:

- Queensland Law Society (**QLS**);
- Property Council of Australia (**PCA**);
- Real Estate Institute of Queensland (**REIQ**);<sup>1</sup>

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<sup>1</sup> The Real Estate Institute of Queensland (**REIQ**) also made a number of submissions in relation to the introduction of a revised disclosure regime for residential tenancy transactions governed by the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld). Although the REIQ's submissions in relation to

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- Urban Development Institute of Australia (Queensland) (**UDIA (Qld)**);<sup>2</sup>
- Spatial Industries Business Association Limited (Queensland) (**SIBA**).<sup>3</sup>

One other submission was made by Robinson & Robinson Lawyers.

The submissions all acknowledge and recognise the difficulties associated with the current seller disclosure framework in Queensland as identified in the Issues Paper. The REIQ noted that the existing mix of obligations creates “inconsistency, confusion and greater potential for disputes”.<sup>4</sup> The QLS submitted that various disclosure obligations have been added over the years in an ad hoc manner with little regard for the increased complexity of the obligations imposed on sellers or the effectiveness of the disclosures in “educating and informing prospective purchasers.”<sup>5</sup> The PCA supports a legislative seller disclosure framework to alleviate many of the issues with the current regime which were raised in the Issues Paper.<sup>6</sup>

The Issues Paper identified a variety of issues associated with the current disclosure regime that impede its effectiveness. The submissions received reinforce that these issues are ‘live’ and do create problems during the conveyancing process. In general, the submissions received in response to the Issues Paper:

- acknowledge the benefit of some form of seller disclosure in Queensland;<sup>7</sup> and
- are supportive of a more streamlined, coordinated and transparent approach to seller disclosure in Queensland, considered in the context of balancing the relevant burdens on buyers and sellers.<sup>8</sup>

The submissions uniformly support the introduction of a statutory disclosure regime or a regime that will result in better “coordination” of the conveyancing process.<sup>9</sup> The REIQ submits that although there are benefits associated with “creating a single piece of legislation to govern all disclosures” there

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disclosures for residential tenancies have been considered by the Review team, they fall outside the scope of the review and are not incorporated into this Interim Report.

<sup>2</sup> The UDIA (Qld) resubmitted its previous submissions relating to the *Land Sales Act Review* and the *Body Corporate and Community Management and Other Legislation Amendment Bill 2012*. UDIA (Qld) did not make any submission specifically responding to the Seller Disclosure Issues Paper.

<sup>3</sup> SIBA indicated that it had no additional comments at this stage of the review but that it would be interested in any recommendation arising from the review and would provide more input at that time.

<sup>4</sup> Real Estate Institute of Queensland, Submission to Property Law Review Issues Paper: Seller Disclosure, 16 April 2014, 2.

<sup>5</sup> Queensland Law Society, Submission to Property Law Review Issues Paper: Seller Disclosure, 7 April 2014, 2.

<sup>6</sup> Property Council of Australia, Submission to Property Law Review Issues Paper: Seller Disclosure, 21 March 2014, 6.

<sup>7</sup> Real Estate Institute of Queensland, above n 4, 1-2; Queensland Law Society, above n5, 2-3; Property Council of Australia submission, above n 6, 1 - although the Property Council of Australia submission notes that the legislative framework should reduce the disclosure requirements placed on a seller and reinforce Queensland’ caveat emptor purchasing environment.

<sup>8</sup> Real Estate Institute of Queensland, above n 4, 2. The REIQ noted that the cost for property owners of a disclosure regime must be maintained at a reasonable level; Queensland Law Society, above n5, 2; Property Council of Australia, above n6, 1-6.

<sup>9</sup> Real Estate Institute of Queensland, above n 4, 1. The REIQ note that the statutory disclosure regime does not have to be in a single location; Queensland Law Society, above n 5, 2; Property Council of Australia, above n 6, 6.

is no strict requirement for this and the most important factor is to incorporate the requirements into a “single document” which is served on the buyer at a consistent point of time.

It is acknowledged in the Issues Paper that a single, coordinated statutory disclosure framework does not guarantee that errors, omissions or oversights will not occur during the conveyancing process. However, the introduction of a statutory disclosure regime in Queensland has the benefit of:

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

Further, the introduction of a statutory regime would bring Queensland into line with the majority of other Australian jurisdictions that have existing statutory disclosure regimes.<sup>10</sup> For these reasons, a statutory seller disclosure regime should be introduced in Queensland.

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

### **1.3. Objectives and framework underpinning a statutory disclosure regime**

As discussed in the Issues Paper, the seller disclosure framework should 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; and
- Balancing the information cost between buyer and seller.

In this respect, the suggested principled approach for achieving these objectives set out in the Issues Paper was accepted by the REIQ and QLS as providing an appropriate framework. The PCA generally accepted the framework subject to some amendments to the first principle of the framework. The first principle provides:

*‘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.’*

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<sup>10</sup> See New South Wales, Victoria, South Australia, Australian Capital Territory and the proposed regime in Tasmania.

The PCA suggested an amendment to the principle as follows:

- information provided by the seller pre-contract should be within the reasonable knowledge of the seller; and
- additional information sought by the buyer for their due diligence should be readily available by search at a reasonable cost to the buyer.<sup>11</sup>

The PCA expressed concern that the principles in their original form direct significant protection to the buyer and do not adequately consider the burden imposed on the seller.<sup>12</sup> Consistent with this approach, the PCA submitted that the legislative framework should reduce the disclosure requirements placed on a seller and should “reinforce Queensland’s caveat emptor purchasing environment”.<sup>13</sup> However, the QLS submission refers to anecdotal material from QLS members that the system of ‘caveat emptor’ can and does backfire on sellers through disputes and failed settlements.

A critical feature of any disclosure regime is to ensure that there is an appropriate balance between the obligations placed on sellers and those burdens which should be borne by the buyer. The first principle of the framework proposes that the information that is disclosed under a disclosure regime should be within the seller’s knowledge. The principle implicitly acknowledges a ‘reasonableness’ component to the type of information that is within the seller’s knowledge by recognising that some of the information may need to be sourced through readily available and often free or reasonably costed searches. Clearly, the timing of any disclosure required potentially impacts on the balance in terms of costs incurred by the seller and the possible duplication of these costs by a buyer later in the contract process. The Issues Paper recognised that it is difficult to quantify the relevant cost burdens or ultimate economic incidence<sup>14</sup> in the absence of an economic analysis of the costs associated with disclosure. What is clear, is that both a seller (complying with disclosure obligations) and a buyer (undertaking due diligence) will incur costs during the pre-contract process. However, the purpose underpinning this benchmark principle in its original form is to ensure that the best balance possible is achieved in any disclosure regime proposed.

For these reasons, the guiding principles set out in the Issues Paper should provide the benchmark principles for the seller disclosure options discussed further below.

**Recommendation 2: The following guiding principles will be used as a benchmark for the 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; and**

<sup>11</sup> Property Council of Australia, above n 6, 2.

<sup>12</sup> Property Council of Australia, above n 6, 2.

<sup>13</sup> Property Council of Australia, above n 6, 1.

<sup>14</sup> That is, whether it is the seller or buyer that bears the greatest economic burden as opposed to the legal burden) of those costs.



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

## 2. What land should be covered by the statutory disclosure regime?

The statutory disclosure regimes in New South Wales, South Australia and Victoria apply to ‘any land’<sup>15</sup> or ‘land’<sup>16</sup> and in the case of South Australia, also the sale of small businesses. These terms are defined broadly in these jurisdictions and encompass a wide variety of property, interests and estates in land including community titles lots. The disclosure regime in the Australian Capital Territory is limited to residential property.<sup>17</sup> In Queensland, there is a variety of descriptions used to identify the relevant land the subject of disclosure obligations. These vary depending on the relevant statute which imposes the obligation. For example, the requirement to disclose the existence of a smoke alarm applies to residential property only,<sup>18</sup> while the obligations under the *Environmental Protection Act 1994* (Qld) may apply to ‘land’, ‘a place’ or a ‘business’ depending on the particular provision.

The REIQ supports a statutory seller disclosure regime for residential property and notes that there may be some benefit in expanding the regime to include commercial and rural property sales in addition to business sales.<sup>19</sup> The QLS supports a seller disclosure regime which applies to all properties. However, the QLS indicates that different requirements may apply to some types of property such as off the plan sales and community titles and that certain transactions should be excluded, for example large transactions.<sup>20</sup> The PCA supports the removal of small business and commercial categories from any disclosure regime.<sup>21</sup>

There are a number of options available regarding the categories of land which could be subject to a statutory disclosure regime. These are discussed below.

### Option 1 - Application to all freehold land with exclusions

This option would result in a statutory disclosure regime that applies to the sale of all freehold land. The legislation could provide for exclusion categories that would not be subject to the disclosure obligations. A recent example of this type of approach is set out in section 160 of the *Property Occupations Act 2014* (Qld). Although the provision is concerned with the sale of residential property it does illustrate how certain contract categories are excluded from the operation of the relevant part of the Act. Section 160 expressly provides that the section applies to a contract for the sale of

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<sup>15</sup> *Conveyancing Act 1919* (NSW) ss 7 and 52A(1). The definition of ‘any land’ is broad and covers strata units or proposed strata units under the *Strata Schemes (Freehold Development) Act 1973* (NSW) or the *Strata Schemes (Leasehold Development) Act 1986* (NSW), lots under a community plan, precinct plan or neighbourhood plan within the meaning of the *Community Land Development Act 1989* (NSW).

<sup>16</sup> *Sale of Land Act 1962* (Vic) ss 2 and 32 and *Land and Business (Sale and Conveyancing) Act 1994* (SA) ss 3 and 7.

<sup>17</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 6(1), 9(1) and 10. The proposed regime in Tasmania is limited to residential property also. See the Residential Transactions Bill 2013 (Tas) cl 3 and 4.

<sup>18</sup> *Fire and Rescue Service Act 1990* (Qld).

<sup>19</sup> The REIQ submission does not explain what these benefits might be.

<sup>20</sup> The Property Council’s submission does not explicitly respond to this issue.

<sup>21</sup> Property Council of Australia, above n 6, 5.

residential property (including an option to purchase) but excludes certain contracts such as those where the buyer is the State, a statutory body, publicly listed corporation or a subsidiary of a publicly listed corporation.

Extending the seller disclosure regime to freehold land only acknowledges that most buyers that benefit from a disclosure regime are operating within the freehold property arena. Limiting the scope of the disclosure regime in this way simplifies the disclosure framework but does not preclude its extension to other land categories in the future, if considered necessary.

A disclosure regime that applies to the sale of all freehold land, with some clearly identified excluded contract and buyer categories, has the benefit of simplifying the existing regime in Queensland and clarifying the property which is subject to the regime. This option will facilitate the creation of a coordinated regime which will also assist to reduce red tape associated with seller disclosure currently, by using the same disclosure process for all land in Queensland.

A possible disadvantage of this approach is that some property sales involving sophisticated buyers, commercial property or large scale transactions may still be caught by the disclosure obligations, despite exclusion categories included within the regime. This could add an additional layer of red tape and transaction costs to conveyances that do not involve buyers that are the usual subject of consumer protection disclosure frameworks. Further, even where an exclusion provision is available, there is an additional process of assessing whether or not the particular transaction is within the scope of the exception.

An alternative is to allow parties to contract out of the provisions in certain circumstances. One suggestion is that where the contract concerns property that is not residential property, contracting out may be permitted. Contracting out will require the parties to seek legal advice which usually requires a form of legal advice certificate. A similar process applies in relation to the shortening or waiving of a cooling off period. The disadvantages of this type of provision include:

- adding a layer of additional complication to the contracting process;
- lawyers are cautious about giving certificates; and
- in cases concerning commercial, industrial or rural land, the seller will often seek to contract out of the provision.

## **Option 2 – Application to all freehold with no exclusions**

This approach is similar to Option 1, except that no exclusions will be permitted and all freehold land will be subject to the seller disclosure regime without exception. This approach has the benefit of creating a certain and static disclosure regime with no possible confusion regarding what land is subject to the regime. However, this benefit can also be a disadvantage by creating an inflexible regime that does not accommodate sales and categories of buyers that should be excluded from the disclosure obligations, because of their sophistication or character (eg a statutory body buying the property).

### Option 3 - Application to residential land only

This option would restrict the statutory disclosure regime to residential land only. The term ‘residential land or property’ could be defined in a way which is consistent with section 21 of the *Property Occupations Act 2014* (Qld). The term is defined in that Act to mean:

*‘real property that is used, or is intended to be used, for residential purposes but does not include real property that is used primarily for the purposes of industry, commerce or primary production.’*

This potentially simplifies the application of the disclosure regime by avoiding the need for varied exclusion categories. Limiting the application of the statutory regime to residential land recognises the difference between transactions involving consumers of residential land and parties involved in commercial or large scale transactions who are often legal entities that have a greater level of conveyancing ‘sophistication’ and experience. Further, this latter category of purchasers also often have existing methods and forms of undertaking due diligence prior to purchasing non-residential property, and as a consequence, earlier disclosure may not be necessary or appropriate. Imposing a disclosure regime on non-residential categories may lead to increased red tape and transaction costs for those sellers.

All other land which is not ‘residential property’ would fall outside the scope of the statutory regime. However, those other land categories would still be subject to the existing disclosure regime in Queensland. Consideration would need to be given to how this might apply and also to removing some of the current disclosure obligations that apply to all land, such as swimming pools, QCAT tree applications and orders, so that they do not apply to non-residential land.

A disadvantage of this approach is that it potentially creates a dual seller disclosure regime – one which applies to residential property and one which is applicable to all other property. This potentially increases complexity and reduces the transparency of the disclosure obligations which apply to the different categories of land.

**Recommendation 3: The seller disclosure regime should apply to all freehold land, subject to exclusions (Option 1).**

#### 2.1. Auctions and options to purchase

The disclosure obligations would apply to auctions and options to purchase land. In the case of auction sales, the contract is unconditional once the successful bid is made and the absence of a cooling off period makes it even more critical for earlier pre-contract disclosure. There is no rationale for excluding options to purchase, particularly put and call options. A seller should be required to comply with their disclosure obligations prior to the buyer signing the option or in the case of a nominee exercising the option, prior to the exercise by the nominee. This is similar to the approach adopted in the *Land Sales Act 1984* following amendments in 2014, as well as the *Property Occupations Act 2014*.

For the purposes of this Interim Report, rights of pre-emption are not intended to fall within the scope of the seller disclosure regime. These rights operate in a slightly different way to options to purchase

and are not offers of sale in the same way that an option to purchase is. Where rights of pre-emption exist, parties should be able to follow the usual process applicable to these.

**Recommendation 4: Auctions and all options (including put and call options) to purchase land should be subject to the statutory seller disclosure regime.**

## **2.2. Proposed lots under *Land Sales Act 1984 (Qld)* and proposed lots under the *BCCM Act*?**

Sales of proposed lots under the *Land Sales Act 1984 (Qld)* (**Land Sales Act**) and proposed lots under the *BCCM Act* have recently been reviewed as part of the complete review undertaken of the *Land Sales Act* between 2010 and 2013. The outcomes of the review are set out in the *Land Sales and Other Legislation Amendment Act 2014 (Qld)* (**Land Sales Amendment Act**)<sup>22</sup>. The *Land Sales Amendment Act* made a number of amendments to the *Land Sales Act* and the *BCCM Act* (and other legislation) to achieve policy objectives which include, amongst others, reducing red tape and regulation relating to the sale and purchase of proposed lots, while ensuring consumer protections are maintained.<sup>23</sup> In the context of seller disclosure obligations, the *Land Sales Amendment Act* made a number of changes including:

- Removing the requirement for the seller of a proposed lot to include names and addresses of the seller and buyer in the disclosure material;
- Removing the requirement for the seller of a proposed lot under the *Land Sales Act 1984 (Qld)* to provide a buyer with a copy of any plan for reconfiguring land for the allotment forming part of a development or compliance permit or approval; and
- Clarifying that where a seller grants a prospective buyer an option to buy a proposed lot the seller is required to provide the relevant disclosure material at that time. Where a contract for sale is subsequently entered into by the same parties for the proposed lot, the prescribed disclosure material is not required to be provided to the buyer again.<sup>24</sup>

Some minor consequential amendments may need to be made to the *Land Sales Act 1984 (Qld)* and the *BCCM Act* in relation to proposed lots to ensure consistency with any proposed seller disclosure reforms, if adopted. However, as a recent and extensive review has already been undertaken, this Interim Report does not consider this category of land in any detail. The proposed seller statement options and body corporate certificate discussed in Parts 3 and 3.1 below do not address disclosures for proposed lots.

**Recommendation 5: The current disclosure obligations under the *BCCM Act*, *Land Sales Act 1984 (Qld)* and the *Building Units and Group Titles Act 1980 (Qld)* should remain in substantially the same form.**

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<sup>22</sup> Act No. 46 of 2014, introduced into the Queensland Legislative Assembly on 3 June 2014 and passed with amendment on 9 September 2014.

<sup>23</sup> Explanatory Notes, *Land Sales and Other Legislation Amendment Bill 2014 (Qld)* 1.

<sup>24</sup> Explanatory Notes *Land Sales and Other Legislation Amendment Bill 2014(Qld)* 3-4.

### 3. Form of disclosure

The other Australian jurisdictions with a statutory disclosure regime each adopt different forms of seller disclosure, although there is some commonality with aspects of the forms adopted. Victoria has recently made some changes to its seller disclosure regime but the requirement for a seller statement form will remain the same. However, an additional disclosure obligation in the form of a due diligence checklist has been inserted into the *Sale of Land Act 1962* (Vic) and must be made available to a prospective purchaser from the time the land is offered for sale.<sup>25</sup> The checklist is only required in relation to vacant residential land or land on which there is a residence.

The options identified in relation to the form of disclosure in the Issues Paper included:

- Option 1 – Statutory warranties (with disclosure occurring where a seller is unable to make particular warranties);
- Option 2 - Certificates from agencies (for example a local government certificate or body corporate certificate);
- Option 3 - Seller statement (and documents);
- Option 4 – A combination of any of the options above.

The Issues Paper noted that there is an absence of consumer behaviour research which specifically considers the best form of disclosure in the context of property sales. A recent report for the Standing Committee of Officials of Consumer Affairs in relation to pre-contractual disclosure under the Consumer Credit Code (**Consumer Credit Disclosure Report**) considered ways to, amongst other things:

- present disclosure documents in a more simplified and concise format than currently provided under the Code; and
- ensure that the disclosure documentation enables consumers to better understand the information because it is clear, concise, conspicuous and readily accessible.<sup>26</sup>

Results from the empirical study undertaken for the purposes of that study support the creation of disclosure documents which are “easier to understand [documents] which summarise concisely the information they [consumers] need to make choices about consumer credit products.”<sup>27</sup> The final simple form of disclosure documents developed in this study, which were adapted for home loans, credit cards, car loans and store cards, were tested on the study participants. The study identified significant improvements in participants’ ability to answer questions about the particular credit where

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<sup>25</sup> *Sale of Land Amendment Act 2014* (Vic) ss 33, 33A, 33B and 33C. This Act was passed on 2 April 2014. The checklist is intended to assist prospective purchasers to identify information which they may wish to obtain in respect of the land for sale which is additional to the information supplied in the section 32 statement for the land: *Sale of Land Amendment Act 2014* (Vic) s 33A; Explanatory Memorandum, *Sale of Land Amendment Bill 2014* (Vic), 10.

<sup>26</sup> Paul O’Shea, *Simplification of Disclosure Regulation for the Consumer Credit Code: Empirical Research and Design Redesign* –Final Report (2010) 2.

<sup>27</sup> *Ibid* 4. The study used a new, simpler form of consumer credit pre-contractual disclosure in a ‘Schumer Box’ format. The Report, describes that a ‘Schumer box’ is named after a US Senator and is essentially a simple disclosure document in a tabular format which contains relevant amounts or rates identifying the essential financial features of a credit contract (at 16).

the simple forms were used, compared to the original consumer disclosure material under the Consumer Credit Code.<sup>28</sup> The literature review undertaken as part of the study also supports “clean, simple, self-explanatory formats” for disclosure in the consumer credit environment.<sup>29</sup> This is consistent with other studies undertaken in the United States in the property context which suggest that a disclosure document in the form of a “simple checklist with space provided below each item for the seller to describe the nature and extent of any disclosed defects” is more likely to be read by a buyer than one which simply attaches a series of searches or certificates.<sup>30</sup>

Currently in Queensland, seller disclosure is in a multi-layered and disparate form originating from a combination of common law, contract, statutory and, more recently, local government obligations. Further, there are a variety of contractual and statutory warranties which require any exceptions to be disclosed. As a result, the actual form of required disclosure in Queensland can include:

- information set out in the Schedule to the contract;
- written confirmation of any exceptions to the contractual and/or statutory warranties;
- certificates or other documents which identify any disclosures that may apply to the relevant land set out in specific provisions under a variety of Queensland legislation;
- a disclosure statement required under the BCCM Act; and
- a variety of documents required under the BCCM Act in the case of proposed lots.

A common theme in the submissions received in response to the Issues Paper is support for a unified or more coordinated approach to seller disclosure in Queensland. This is consistent with components of the third and fourth framework principles which provide for, amongst other things, consistency in the form of disclosure and ensuring the information is in an accessible form which is easily understood by the buyer. However, there is some variation in the submissions regarding the particular form that disclosure should take. For example, the PCA’s preferred approach is to have buyers undertake their own searches for information that falls outside the reasonable knowledge of the seller.<sup>31</sup> If this approach was not favoured, the PCA expressed some support for a certificate based disclosure with a number of qualifications.<sup>32</sup> The QLS expressed some support for a number of options, including attaching certificates only, but overall appeared to prefer Option 4 – a combination of statutory warranties, seller statement<sup>33</sup> and some limited certificates/documents.<sup>34</sup> The REIQ generally

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<sup>28</sup> Ibid 6.

<sup>29</sup> Ibid 242.

<sup>30</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. See also Australian Government, *Financial System Inquiry Interim Report* (2014), 3.59 which noted that better information presentation could improve disclosure by using shorter disclosure documents, plain English, graphics and breaking down complex information to improve consumer understanding.

<sup>31</sup> Property Council of Australia, above n 6, 2.

<sup>32</sup> These qualifications included identifying the date from which the certificate is current and the time period it remains current, ensuring the issuing authority remains responsible for the reliability of the certificate and providing the certificates within a reasonable time frame and at a reasonable cost to the seller.

<sup>33</sup> For example, statements regarding exceptions to statutory warranties, including contaminated land or environmental management register issues, no proposals by an authority affecting the land or no tree or fence disputes.

<sup>34</sup> Queensland Law Society, above n 5, 7.

preferred the incorporation of all existing statutory (and other disclosure obligations) into a single document which is served on a buyer at a consistent point in time.<sup>35</sup>

The submissions recognised some advantages and disadvantages of the various forms of disclosure.<sup>36</sup> For example, a statutory warranty only disclosure form may simplify the documentation provided to a buyer but would not be appropriate for all items such as body corporate levies.<sup>37</sup>

A certificate only approach may prove difficult unless state and local authorities have in place a consistent form of property information statement and search request process. Timeliness in providing the relevant certificates may also be an issue. The PCA considered that the section 149 certificates issued by local government authorities in New South Wales<sup>38</sup> would be a reasonable model to reproduce in Queensland. However, there is a potential practical impediment to requiring local councils to produce these certificates in a complete and timely manner. Although larger Councils may have this information readily available, there are other smaller councils where the information is either not easily accessible or no longer exists as a result of weather (or other) events. Some disadvantages of this approach include potentially imposing a greater cost burden on the seller and possible concerns about the accuracy and currency of the information provided. Buyers may continue to duplicate searches to verify information.<sup>39</sup>

There were some disadvantages identified in the submissions to a seller only statement including possible increase in the time required to fill out the statement, increased risk of typographical and transpositional errors and potentially, a longer lead time before a property can be listed.<sup>40</sup> Further, commentary on consumer disclosure suggests that where a seller statement regime imposes “complex procedures for compliance”, buyers have been able to rely on technical reasons to avoid the contract.<sup>41</sup> It is also likely that buyers’ solicitors will continue to undertake duplicate searches to verify the information provided in the statement and any attached certificate.

The disparate sources and forms of the disclosure obligations currently in Queensland may support a disclosure regime that uses a combination of the forms of disclosure identified above, with the seller statement as the primary coordinating document. The seller statement will not form part of the contract. This approach provides an opportunity to consolidate into a single document (the seller statement) the primary disclosure obligations set out under the various statutes, key warranties from under the relevant REIQ standard form contracts and existing (and any new) statutory warranties. The requirement for documents or certificates to accompany the statement would be restricted to only

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<sup>35</sup> Real Estate Institute of Queensland, above n 4, 3.

<sup>36</sup> The Queensland Law Society canvassed these in its response to Questions 14 and 15 in the *Property Law Review Issues Paper 1 – Seller Disclosure in Queensland*.

<sup>37</sup> See Queensland Law Society, above n 5.

<sup>38</sup> The section 149 certificates are issued under the *Environmental Planning and Assessment Act 1979* (NSW) and include information from local councils about matters affecting the land such as zoning, road widening, heritage information and contribution plans in the one certificate.

<sup>39</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, 166-169; Christensen et al, above n 30, 274-276.

<sup>40</sup> Queensland Law Society, above n 5.

<sup>41</sup> Christensen et al, above n 39, 166-169.

key documents such as a copy of the title, QCAT tree orders or applications which are required to be provided, pool safety certificates and coastal protection notices.

There are a number of ways in which the seller statement could be presented and these are discussed below.

### **Option 1 – Seller statement listing all disclosures**

The majority of the information required to be disclosed in Queensland would be clearly identified in a simple tabulated seller statement checklist type document which provides space for a seller to include critical information. This information would be incorporated into the statement by listing all the disclosures and requiring sellers to indicate ‘yes’ or ‘no’. Where a disclosure is made, there may be an additional requirement to provide further details in the document or attach a copy of a document. For example, the seller may be required to provide a copy of a registered easement or further details of encumbrances that will not be released at settlement. This option is illustrated at **Attachment A**.

### **Option 2 – Seller statement listing all disclosures which is accompanied by a summary document**

This approach is very similar to Option 1 above in that all the relevant disclosures are listed in the seller statement. The primary differences are that:

- the seller statement includes a single page summary document which enables a seller to easily and quickly identify whether or not there is a need to make any disclosures. Where disclosure is required, the summary document directs the seller to the detailed list of disclosures; and
- the disclosures are grouped under appropriate subject matter headings to potentially assist buyers to quickly identify any potential problems with the property.

An illustration of the form this option might take is at **Attachment B**.

### **Option 3 – Seller statement which only lists exceptions to the warranties provided by the seller under the legislation**

This option proposes a different form of the seller statement and is premised on a seller warranty disclosure regime. The relevant legislation would include a provision that lists all the current disclosures required (and some limited new proposed disclosures) in the form of seller warranties. The only disclosures required in the seller statement would be the exceptions to the warranties. For example, if the seller is unable to warrant that the lot is not affected by a registered easement, then the seller statement would disclose the existence and details of the relevant easement. The statement would also incorporate a list of the matters warranted as a note to the seller. The use of a seller warranty approach for disclosure has a number of advantages including simplifying the disclosure regime by incorporating the disclosures in a single location, enabling the creation of a simpler form of



the seller statement (and a shorter form) as disclosure is only required if a seller is unable to warrant a particular matter and facilitating a greater level of transparency of disclosure obligations.

A proposed form of the seller statement proposed by this option is set out at **Attachment C**.

### **Option 4 – Seller statement which only lists exceptions to the warranties provided by the seller along with a copy of the title**

This option is very similar to Option 3 above and is based on a seller statutory warranty disclosure regime. The main differences with Option 4 are that:

- It provides a slightly simpler form of the statement;
- It requires the seller to attach a copy of the title. The seller then warrants that there are no other interests (if he or she is able to do so). The inclusion of a copy of the title is aimed at providing an opportunity for a buyer to ask the agent for more information if the title identifies any problems, for example an encumbrance. If the buyer does not understand the significance of the problem, it may compel them to see a lawyer; and
- a seller is required to indicate a 'yes' or 'no' answer to the statement. A 'yes' response by the seller means that the statement is correct. If the answer is 'no' the seller must disclose the reason why the statement is not correct. The disclosed information can be attached in any appropriate form under this option.

A proposed form of the seller statement proposed by this option is set out at **Attachment D**.

The advantage of Option 4 compared to Option 3 above, is that it provides a slightly simpler layout and greater flexibility (and discretion) regarding how the seller provides the disclosures where they are required in the statement. Further, it clearly incorporates into the form the warranties that the seller is providing under the legislation and makes these obvious, rather than having them incorporated into a note at the back of the statement, as proposed by Option 3.

**Recommendation 6: The form of the seller disclosure in Queensland should be a seller statement as described in Option 4 – 'seller statement which only lists exceptions to the warranties along with a copy of the title'. Copies of some documents may need to accompany the statement, where appropriate.**

**Recommendation 7: The form of the seller statement should be prescribed and must be a simple, tabulated document in either the form proposed in Attachment D or which:**

- **Enables the seller to understand the warranties that he or she is providing and the need to disclose information where the relevant warranty cannot be given; and**
- **Is easily understood by the buyer.**

### **3.1. Body Corporate Certificate**

It is clear that in the case of existing lots in a community titles scheme, there will be additional and different disclosure information to that provided in relation to other property more generally. Further, the warranty approach does not fit neatly with body corporate information that is currently

disclosed. The disclosure obligations imposed in relation to existing lots under the BCCM Act require the seller to provide a disclosure statement containing the information specified in section 206. There is also scope for interested persons (including potential buyers) to request, and be provided with, a body corporate information certificate.<sup>42</sup> The recipient of the certificate is able to rely on it as conclusive evidence against the body corporate of matters contained in the certificate.<sup>43</sup> Although there is some overlap between the material which is required to be disclosed in the section 206 statement and the information which is available in the body corporate information certificate, there are also some differences.<sup>44</sup>

A large portion of the information required to be disclosed currently (and available upon request) relates to any possible financial liability of a prospective buyer. The information is unique to lots in community titles schemes. Incorporating the required information into a separate form ensures that purchasers of other land will not need to check through or consider the category of information applicable only to community title lots. A possible form of disclosure is a body corporate certificate which will consolidate all existing statutory disclosures required for community titles, including the information which can be requested under section 205 of the BCCM Act. This certificate will be given with the seller statement. The layout of the certificate will be simple and should enable a prospective purchaser to immediately identify key information relevant to the lot for sale. This will ensure that the information is in an accessible form which can be easily understood by the buyer. The form proposed is consistent with the seller statement and will accompany the seller statement where the sale involves a lot in a community titles scheme. The buyer should be able to rely on the certificate against the body corporate as conclusive of matters stated in the certificate. This should be qualified to the extent to which the certificate contains an error which is reasonably apparent.<sup>45</sup>

The body corporate certificate will be issued instead of the seller disclosure statement required under the BCCM Act. **Attachment E** sets out a proposed form for the body corporate certificate.

**Recommendation 8: Information relevant to community title lots should be provided in the form of a body corporate certificate. This certificate will accompany the seller statement when provided and will replace the disclosure statement required under section 206 of the BCCM Act and the body corporate certificate which is available under section 205 upon request.**

#### 4. Timing of disclosure

Currently in Queensland, when a contract is entered into there is limited information provided about the property beyond the real property description 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. Generally, disclosure material provided to a buyer should be relevant to the buyer's decision regarding whether or not to purchase the property.<sup>46</sup> The timing

<sup>42</sup> *Body Corporate and Community Management Act 1997* (Qld) s 205(4)

<sup>43</sup> *Body Corporate and Community Management Act 1997* (Qld) s 205(5)

<sup>44</sup> For example, the disclosure statement requires information about the secretary of the body corporate or body corporate manager (where applicable) and whether there is a body corporate committee for the body corporate.

<sup>45</sup> This is the approach currently taken in relation to a body corporate certificate which can be obtained by the buyer, on request, under s 205(5) of the *Body Corporate and Community Management Act 1997* (Qld).

<sup>46</sup> Consumer Affairs Victoria, *Review of Section 32 of the Sale of Land Act 1962* (2012), 4.

of when disclosure is required is important to the relevance and effectiveness of any disclosure made.<sup>47</sup>

There is support from studies for the position that earlier disclosure of information has greater impact on a buyer's decision making than disclosure which occurs after contracts have been signed.<sup>48</sup> The Consumer Credit Disclosure Report considered the issue of early and late disclosure in the context of the Consumer Credit Code. The exact timing of pre-contractual disclosure is not prescribed under the Code, other than requiring it to be provided prior to the consumer entering into the relevant contract.<sup>49</sup> Based on the results of the relevant empirical studies undertaken, the Report indicated that "consumers have more confidence, find comparison of products easier and make more informed choices...when exposed earlier to consumer credit disclosure."<sup>50</sup> The benefits of earlier disclosure include allowing a buyer more time to consider relevant information to determine whether or not an offer will be made and also how much to offer. Buyers also have the opportunity to make further inquiries where they consider this necessary prior to making an offer.<sup>51</sup> Disadvantages from a seller's perspective include concerns about possible delays in listing the property and additional time and, possibly, costs involved in preparing the disclosure material.

All the submissions which addressed the issue of timing supported a consistent, single point in time disclosure of all seller disclosure information. The PCA preferred the South Australian approach to timing which requires disclosure of the relevant seller statement after the contract has been signed but before settlement. This approach defeats the purpose of disclosure. The REIQ did not specify a point in time during the pre-contract period when disclosure should occur. The QLS indicated a preference for the disclosure material to be available as soon as the property is marketed (similar to the model in the Australian Capital Territory) but queried whether this should be mandated in the statutory regime or whether it would simply become common practice over time.<sup>52</sup>

#### **4.1. Options for timing**

The different options for the timing of disclosure are set out below.

##### **Option 1: Require disclosure to occur prior to the buyer signing the contract.**

This option would require a seller under a contract for the sale of land to give a buyer a copy of the seller statement, before the buyer signs the contract. This is the same approach as adopted in New South Wales and Victoria.

The disadvantage of this option is that there is some fluidity regarding the actual point in time that disclosure might actually occur. The requirement could be satisfied by providing the disclosure

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<sup>47</sup> Ibid.

<sup>48</sup> For further analysis of this issue see Christensen et al, above n 30, 276-278 and Christensen et al, above n 39, 169-171.

<sup>49</sup> Paul O'Shea, above n 26, 166.

<sup>50</sup> Ibid, 241. Early disclosure in the case of a home loan in this study occurred at the approval letter stage and in the case of credit cards, at the solicitation Letter or pre-approval letter stage.

<sup>51</sup> Consumer Affairs Victoria, above n 46, 4.

<sup>52</sup> Queensland Law Society, above n 5, 7.

material on the same day that the contract is signed which would provide the buyer with limited time to actually consider the material disclosed.

**Option 2: The seller statement must be available from the time the property is offered for sale and before the contract is entered into.**

This option has two parts and requires the seller statement (and body corporate certificate, where applicable) to be:

- available to a prospective buyer of residential property from the time the property is offered for sale. For example, from the time the property is advertised by the agent or seller or the seller invites offers in relation to the property. The same timing for disclosure will apply to the body corporate certificate, which must be given with the seller statement. This approach is similar to the position in the Australian Capital Territory where the seller of a residential property commits an offence if all the required documents are not available for inspection when an offer to buy the property may be made to the seller;<sup>53</sup> and
- provided to the buyer prior to the buyer entering into the contract.<sup>54</sup>

Further details about the components to this option are discussed below.

***Statement available to a prospective buyer of residential property from the time the property is advertised by the agent or seller***

The objective of this requirement is to provide disclosure to a prospective buyer of residential property at the earliest possible stage of the sale process – that is, at the beginning. The effectiveness of providing early disclosure is supported by the literature and is discussed in detail in Part 4 above. Although the QLS indicated a preference for disclosure at this stage of the conveyancing process, it expressed uncertainty regarding whether it should be mandated. The QLS suggested that if the information disclosed under a statutory regime was of value to buyers, earlier disclosure would become common practice as buyers would request the information at an earlier stage of the sale process.<sup>55</sup> The PCA does not support any legislative process that requires disclosure by a seller to a non-contracted party.<sup>56</sup>

Limiting the application of disclosure at this early stage to residential property only recognises that in some transactions involving ‘sophisticated’ parties or commercial property, disclosure prior to knowing who the purchaser is may impose additional burdens on the parties. The *Property Occupations Act 2014* (Qld) provides a definition of ‘residential property’ which may provide a model

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<sup>53</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 10.

<sup>54</sup> The same timing applies to the body corporate certificate which must be given with the seller statement.

<sup>55</sup> Queensland Law Society, above n 5, 7. The Queensland Law Society also noted that the approach could result in additional costs for the sellers if there is a long marketing campaign and the new regime imposed currency requirements.

<sup>56</sup> Property Council of Australia, above n 6, 4.

for defining the term under the statutory disclosure regime.<sup>57</sup> In the case of buyers of residential property, requiring early disclosure allows a buyer more time to consider relevant information to determine whether or not an offer will be made, how much to offer and provides buyers with the opportunity to make further inquiries where they consider this necessary prior to making an offer. Nearly all of the information required for the proposed seller statement is now required in any case to enable a seller (or real estate agent) to prepare the existing contract of sale. Further, this early disclosure would assist in the marketing process by having all the information needed for contracting 'on the table' from the start of the sale process.

A seller statement may be 'available' if:

- copies of the statement are on display or offered to prospective buyers at any inspection held of the land; and
- any marketing material relevant to the land states that the seller statement is available to prospective buyers.<sup>58</sup>

Another possible way to make the material available to prospective buyers is to allow access to the seller statement through any internet site maintained by the seller and any person acting as the licensed estate agent of the seller.<sup>59</sup> The practicalities of this approach would need further consideration by relevant stakeholders.

Failure on the part of the seller or agent to make a seller statement available would constitute an offence. Further, in order to avoid imposing this obligation on sellers involved with certain categories of buyers (or transactions), a defence or excuse provision should also be included. This is discussed in further detail in Part 7 – Remedies below.

***Disclosure of the seller statement is required before the buyer enters this contract***

This second part of the option does not require the seller to give the statement twice but is intended to ensure that:

- in the case of residential sales, that the actual buyer of the property receives the seller statement prior to entering into the contract. The requirement effectively operates as a back-up if for some reason a statement is not made available to a buyer of residential property from the time the property is offered for sale; and
- all buyers of freehold land (residential and non-residential) receive a copy of the seller statement prior to the contract being entered into.

Clearly, where the statement was disclosed at the time the residential property is offered for sale then both the first and second part of the obligations have been satisfied – that is, it was 'available' and by

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<sup>57</sup> *Property Occupations Act 2014* (Qld) s 21 defines 'residential property' to mean 'real property that is used, or is intended to be used, for residential purposes but does not include real property that is used primarily for the purposes of industry, commerce or primary production.'

<sup>58</sup> This is the approach adopted in Victoria in relation to the disclosure of a due diligence checklist. See *Sale of Land Act 1962* (Vic), ss 33A and 33B(6).

<sup>59</sup> This is one mechanism provided for in Victoria in relation to the due diligence checklist: see *Sale of Land Act 1962* (Vic) s 33B(6).

virtue of being provided earlier, it has been provided prior to the contract being entered into. In the case of non-residential property which is not subject to the earlier disclosure requirement, the seller will still be required to provide the statement prior to the buyer entering into the contract.

### **Option 3: Disclosure to occur at least one day before an offer can be accepted**

This approach is a compromise between Options 1 and 2 (as well as 3) above.<sup>60</sup> It ensures that there is some time provided to the buyer between the point at which the buyer is given the disclosure material and the actual signing of the contract. Essentially, the approach would be to prevent the seller or the seller's agent from accepting an offer to purchase the land unless the prospective buyer has:

- (a) been provided with a copy of the seller statement; and
- (b) allowed, at least, one full business day to consider the information contained in the seller statement.

The QLS was concerned that this type of approach would be unworkable in practice. In its view, if a buyer chooses not to read a seller statement, it is not reasonable to prevent them from signing a contract immediately.<sup>61</sup>

**Recommendation 9: The seller statement and, where applicable, the body corporate certificate must be available to prospective buyers of residential property from the time the property is offered for sale (Option 2).**

**Recommendation 10: The seller must provide a copy of the seller statement, and where applicable, the body corporate certificate to the buyer prior to contract being entered into. The seller is not required to provide disclosure twice.**

## **4.2. Acknowledgement of seller statement**

Although the timing of disclosure is important, there is a separate but interrelated issue of establishing whether or not disclosure has occurred. Whether or not the actual purchaser of the property has received a copy of the seller statement (whether or not accompanied by the body corporate certificate) may have ramifications for the availability of particular remedies. There are a number of possible options to address this issue which are outlined below.

### **Option 1: Buyer to sign the seller statement upon receipt**

This option would require a buyer to sign either a copy of the seller statement or a separate acknowledgement form to confirm that the buyer has actually received a copy of the seller statement.

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<sup>60</sup> The option is based on a modified form of the *Banking Code of Practice 2013*, clause 31.5.

<sup>61</sup> Queensland Law Society, above n 5, 7.

This would occur as a matter of course in organised real estate practices if the option was implemented.

### **Option 2: Contract for sale includes a statement that disclosure has occurred and acknowledgement from the buyer**

Under this option, the disclosure legislation would require that the seller ensure the sale contract includes a section to enable the buyer to acknowledge by signature that he or she received the seller statement (whether or not it is accompanied by the body corporate certificate) from the seller. This option would operate in a similar way to the cooling-off notice approach under the *Property Occupations Act 2014* (Qld).<sup>62</sup> The acknowledgment provision could be located close to, or incorporated into, the cooling off notice required to be included in the contract of sale.<sup>63</sup>

This approach enables a seller to establish that he or she has provided the seller statement. It also ensures that sellers or agents do not need to 'chase' signatures from prospective buyers on the actual seller statement, particularly if the actual buyer was provided a copy of the seller statement at a very early stage in the sale process. It potentially reduces the need to provide duplicate copies of the statement for signature (one for the seller and one for the buyer to keep) and may avoid disputes over the issue of receipt of the statement which may not be achieved with Option 1.

However, this approach does have some disadvantages. It potentially adds an additional layer of compliance (and red tape) to the disclosure framework. Further, it provides greater opportunity for technical non-compliance which may result in the contract not proceeding.

### **Option 3: Onus rests on seller to prove the disclosure was made**

This option does not impose any formal acknowledgement requirement but rather, places the onus on the seller (and his or her agent) to establish, in the case of a dispute, that disclosure of the seller statement (whether or not accompanied by the body corporate certificate) to the buyer occurred prior to the contract being entered into. This approach reflects that control over giving a statement rests with the seller and their agent. As a consequence, it is appropriate (where a dispute exists) that the onus of proving that the seller complied with the statutory disclosure obligation should rest with the seller.<sup>64</sup> This option is favoured.

**Recommendation 11: In the case of a dispute, the onus of proving that the seller complied with the statutory disclosure obligation should rest with the seller (Option 3).**

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<sup>62</sup> *Property Occupations Act 2014* (Qld) s 165.

<sup>63</sup> *Property Occupations Act 2014*(Qld) s 165.

<sup>64</sup> This approach was adopted under section 365(5) of the *Property Agents and Motor Dealers Act 2000* (Qld) which provided: 'If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.' The provision has been removed from the Act following amendments in 2010 and the Act was repealed by the *Property Occupations Act 2014* (Qld) s 237.

## 5. Content of disclosure

One of the key objectives of the seller disclosure regime identified in Part 1.3 above is to provide information that is of value to the decision of the purchaser. This objective is reflected in the second guiding principle recommended for use as a benchmark for the seller disclosure regime – that is, information should be of value to a buyer in making a decision to purchase, including primarily information impacting on title to the property or significant financial liability arising from ownership. The objective, of course, needs to be balanced against other factors such as the burdens imposed on the sellers in providing the disclosure. The Issues Paper:

- highlighted the gap in the literature and the absence of any empirical studies which have considered the information which is of most relevance to a buyer in a property disclosure regime;
- noted that all current statutory seller disclosure regimes in Australia have been established partly on the basis of a perceived information asymmetry arising from the principle of caveat emptor;
- recognised that there is an ongoing need to ensure that required disclosures balance the burdens and benefits to both sellers and buyers; and
- identified some consumer behaviour research which suggests that providing large volumes of information is counterproductive and consumers may not even consider it or understand it.

The PCA supports the need for disclosure of information relating to both defects in title and defects in quality of title by the seller.<sup>65</sup> The PCA considers that requiring the seller to seek out third party information on the property places an unreasonable onus on the seller as it is outside the seller's reasonable knowledge and should form part of the buyer's due diligence.<sup>66</sup> The REIQ supports the inclusion of existing statutory and contractual disclosure obligations into a single disclosure regime.<sup>67</sup>

In the absence of substantive research which supports either the inclusion or exclusion of specific information relevant to the conveyance of a property, there is significant benefit in maintaining the content of the existing disclosure obligations currently in Queensland, with some additions. These benefits include:

- simplifying the transition to a statutory seller disclosure regime by keeping required disclosures consistent with the current regime. There is then opportunity to potentially undertake research into the optimal disclosure content, balancing the burdens and benefits to both the seller and buyer, at a later stage of the reform process; and
- satisfying one of the benchmark principles of the framework that the information to be provided by the seller to the buyer pre-contract should be within the seller's knowledge or

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<sup>65</sup> The Property Council of Australia indicated support for Option 1 – the need to provide information only about matters affecting the title to the property. The Queensland Law Society does not consider that the information currently required to be disclosed in Queensland is appropriate. However, the response does not explain why this is the case.

<sup>66</sup> Property Council of Australia, above n 6, 3-4.

<sup>67</sup> Real Estate Institute of Queensland, above n 4, 3.



readily available by search at reasonable cost to the seller. The information currently the subject of disclosure obligations in Queensland, on the whole, can satisfy this principle.

**Recommendation 12: The information which is currently required to be disclosed in Queensland should be retained under a statutory disclosure regime.**

## 5.1. Additional disclosure information proposed

There are a wide range of views between key stakeholders regarding the information which should be incorporated into the disclosure regime and information which should not be included. For example, the QLS submitted that information which is not readily available should be excluded from the disclosure regime.<sup>68</sup> It identified information such as title search, survey plan, easements and covenants, planning and rates information, building approvals, drainage plans, pool safety certificates, flood information (where available) for inclusion in the disclosure regime.<sup>69</sup> The REIQ suggested the inclusion of the certificate of title into the disclosure document and other disclosures such as drug manufacturing and other illegal activity use, details of untimely deaths that have occurred within the property, flooding history of the property and pest and building inspection reports.<sup>70</sup>

An overview of the advantages and disadvantages of requiring disclosure of Pest and Building Inspection reports, flood information and building approvals is discussed in further detail below.

### Pest and Building Inspection Reports

Seller commissioned pest and building reports potentially save buyers money, time and can streamline the contract process by eliminating the need for a conditional contract. These reports do form part of the statutory disclosure regime in the Australian Capital Territory.<sup>71</sup> Although the seller initially bears the cost of the building and pest report, the legislation provides for the buyer to reimburse the seller on completion of the contract for sale.<sup>72</sup> Under the ACT model, the buyer is entitled to compensation for any loss or expense incurred for a report which is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care.<sup>73</sup> The relevant regulation in the ACT requires that the report must be completed in accordance with the relevant Australian Standard.<sup>74</sup> The report must also include:

- detail about professional indemnity insurance held by the inspector and a certificate of currency; and
- a statement that no reliance may be placed on the report for any contract entered into more than 180 days after the date of the inspection.<sup>75</sup>

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<sup>68</sup> In this respect, the Queensland Law Society referred to the GCCC Local Law 17 as an example of an obligation requiring disclosure of information that is not readily available: Queensland Law Society, above n 5, 8.

<sup>69</sup> Queensland Law Society, above n 5, 7.

<sup>70</sup> Real Estate Institute of Queensland, above n 4, 3-4.

<sup>71</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(1)(e).

<sup>72</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 18(1).

<sup>73</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 19. The Act specifies that there are certain categories of people who should not prepare the report including a family member of the seller etc: see s 9(3).

<sup>74</sup> *Civil Law (Sale of Residential Property) Regulation 2004* (ACT) cl 7.

<sup>75</sup> *Civil Law (Sale of Residential Property) Regulation 2004* (ACT) cl 7.

New South Wales considered the viability of requiring a seller to provide certain pre-purchase reports (including a building and pest inspection report) in 2010.<sup>76</sup> The Final Report from that review recommended the introduction of mandatory building and pest inspection reports as part of the mandatory seller disclosure obligations. The recommendation was not implemented in New South Wales.<sup>77</sup>

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

- avoiding a situation where several prospective purchasers obtain different reports for the same property;
- addressing the issue of a prospective purchaser paying for reports on multiple properties they are interested in;<sup>78</sup> and
- ensuring the report is available upfront which is particularly helpful when the property is for sale by auction.<sup>79</sup>

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

- the risk that sellers may shop around for reports that are favourable to the property<sup>80</sup> and, as a result, buyers will continue to commission their own reports and incur additional costs;
- issues surrounding the currency of the reports. This is an issue if a property takes an extended period of time to sell;<sup>81</sup> and
- issues surrounding the qualifications of the relevant inspectors, licensing of the inspectors, quality of the reports produced and independence of the inspectors.<sup>82</sup>

The REIQ support the introduction of some form of seller commissioned building and pest inspection reports in connection with property sales.<sup>83</sup> The QLS does not support the inclusion of these reports into the seller disclosure regime. It considers that buyers will duplicate such reports in any event and that “seller disclosure is not suited to subjective opinion related information.”<sup>84</sup>

**Recommendation 13: A mandatory seller commissioned pest and building inspection report should not be introduced as a statutory disclosure obligation in Queensland.**

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<sup>76</sup> Land and Property Management Authority, *Review of Vendor Disclosure for Residential Property Sales in NSW: Discussion Paper* (2010).

<sup>77</sup> There was a change of Government in New South Wales following the issue of this Report and the existing government has indicated that the current system would remain: see Heath Aston et al, ‘Building inspectors to be licensed’, *Sydney Morning Herald* (online), accessed 24 June 2014 <http://smh.domain.com.au/calls-for-building-inspectors-to-be-licensed-20110813-1irxy.html>

<sup>78</sup> Land and Property Management Authority, above n 76, 2.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid 3.

<sup>82</sup> Ibid 3 and 12.

<sup>83</sup> Real Estate Institute of Queensland, above n 4, 4.

<sup>84</sup> Queensland Law Society, above n 5, 8.

## Flood Information

Both the REIQ and QLS suggested that the flooding history of a property could be disclosed by the seller.<sup>85</sup> There are advantages and disadvantages to requiring this information. In the light of recent weather events in Queensland, this type of information is likely to be of interest to buyers and potentially impact on whether or not a buyer will purchase a property and possibly the price offered. It is usually information that is within the personal knowledge of the seller and therefore easy to confirm.

However, there are potential difficulties associated with defining what ‘flooding’ actually encompasses. For example, flooding that has occurred because a property is located in a flood prone area has a different character to a one off inundation of water following a particularly severe storm. Further, there is already a significant amount of free government information (including maps) regarding flood risk areas which is easily and quickly accessible by a potential buyer. For properties within the Brisbane City Council local government area, potential purchasers (and sellers) can obtain a free ‘FloodWise Property Report’ immediately which provides information about flood risks for a specified lot or property. The availability of similar information in other local government areas depends on the size of the local Council, record keeping practices and the availability of information particularly since recent flooding and other natural disaster events in Queensland. The Queensland Reconstruction Authority has an ongoing program of preparing and releasing floodplain maps for all of Queensland. Those maps that have been completed are available for free online. Similarly, the Department of Natural Resources and Mines has an interactive flood check available online for all of Queensland. It includes flood imagery for 2010-2011.

**Recommendation 14: Flooding information should not be introduced as a statutory disclosure obligation.**

## Building Approvals

There is currently no requirement in Queensland to disclose details of building approvals in place for freehold land. A number of other jurisdictions require the disclosure of this information under the statutory regimes in place.<sup>86</sup> This information may be helpful in identifying illegal structures and the absence of approval can potentially restrict the use of the land. However, the overall usefulness of the information is questionable. Approval information will not necessarily assist with exposing defects in the structure erected on the land or compliance with all aspects of the approval. Further, it is not always information which is within the seller’s knowledge, particularly if the property has been sold a number of times previously. In that situation, the seller would need to undertake a search which is currently not available online and usually involves a waiting period of at least 5 days for the information. The approval information is also only available through local councils. Although the larger metropolitan councils are likely to have this information readily available, other smaller regional

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<sup>85</sup> Real Estate Institute of Queensland, above n 4, 4.

<sup>86</sup> See for example *Civil Law (Sale of Residential Property) Regulation 2004* (ACT), reg 7(6)). Details of building permits are required to be disclosed in Victoria.

councils may not have complete records, particularly following the recent natural disasters which have occurred in Queensland.

A seller is likely to incur additional costs in requesting these records without any clear evidence that the benefit to the buyer balances the costs incurred by the seller.

**Recommendation 15: Building approval information should not be required as a statutory disclosure obligation.**

There is some additional information which is proposed for inclusion in the Queensland statutory seller disclosure regime as follows:

- Vegetation Protection Order details;
- PMAV (property map of assessable vegetation);
- Services infrastructure connected to the land (electricity, water and sewerage);<sup>87</sup>
- Resource authorities (eg mining tenements, geothermal tenure, petroleum authority, tenure or licence), access agreements and conduct and compensation agreements affecting the land; and
- Details of Queensland Heritage Register and Local Heritage Register entries.

The rationale for including this additional information is that each category, if it affects the land for sale, potentially restricts the use that can be made of the land. A common feature of this information is that it all should be within the knowledge of the seller and easily incorporated into the seller statement. Further, some of the information is not easily accessible (or not accessible at all) by the prospective buyer. For example, details of whether certain infrastructure services such as electricity, water and sewerage are connected to the land. Requiring disclosure of information within the seller's knowledge does not impose an onerous burden on the seller and potentially reduces any searches (and possible costs) that a buyer may have to undertake to determine if the land is affected by any of these matters.

**Recommendation 16: A seller should be required to disclose the following additional information:**

- **Vegetation Protection Order details;**
- **Services infrastructure (electricity, water and sewerage) connected to the land;**
- **Resource authority and access, conduct and compensation agreements affecting the land; and**
- **Details of State Heritage Register and Local Heritage Register entries.**

## **5.2. Additional information disclosure for lots in a community titles scheme**

The QLS proposed the inclusion of information such as the certificate of classification for buildings (where applicable), body corporate levies certificate and minutes for meetings of the body corporate (within a limited time period). The QLS also suggested the inclusion of explanatory material regarding the role of the body corporate and committee, the obligation to pay levies and the importance of the

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<sup>87</sup> The cost of establishing services not connected to land can be high.

sinking fund.<sup>88</sup> An advantage of including this type of information is that buyers will have access to material that explains the significance and function of the information which is disclosed to them. However, there is no guarantee that buyers will even refer to the material or use it and it could simply become an additional layer of information that is not of value to the buyer. Disclosure of this kind of material may simply add to the disclosure burden imposed on sellers with limited benefit to the buyer.

The proposed Body Corporate Certificate includes some additional information for inclusion in the seller disclosure regime.<sup>89</sup> This additional information is:

- By-laws (including exclusive use by-laws);
- Notice of resumption of common property;
- Additional Insurance information including the amount of cover, the period of cover and details of any current or outstanding claims made under the policy;<sup>90</sup> and
- Information specific to the body corporate such as whether it is involved in litigation (and adjudication), whether it has received a show cause or enforcement notice or a notice or order requiring work to be done or money spent in relation to the scheme.

The proposed disclosures above comprise both financial information that a prospective buyer may be liable for if the sale proceeds and details of restrictions on the use of the relevant property. For example, the content of the by-laws in place for a community titles scheme can have far reaching impact by potentially restricting what an owner can do with their particular lot and the common property. Similarly, a notice of resumption in relation to common property can diminish the value of the lot being purchased. Some of this information should be within the knowledge of the seller or easily accessible by the seller.

**Recommendation 17: The Body Corporate Certificate should also include the following additional information:**

- **By-laws (including exclusive use by-laws);**
- **Notice of resumption of common property;**
- **Additional Insurance information including the amount of cover, the period of cover and details of any current or outstanding claims made under the policy; and**
- **Information specific to the body corporate such as whether it is involved in litigation (and adjudication), received a show cause or enforcement notice or a notice or order requiring work to be done or money spent in relation to the scheme.**

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<sup>88</sup> Queensland Law Society, above n 5, 7.

<sup>89</sup> It is proposed that the body corporate certificate also include details of any lease, easement or other right affecting the common property or body corporate assets approved in the last 3 months but not yet registered. This is not 'new' disclosure information as it is currently in the form of a contractual warranty in the REIQ Contract for Residential Lots in a Community Titles Scheme, clause 7.4(3)(a).

<sup>90</sup> The Reference Schedule for to the REIQ Contract for Residential Lots in a Community Titles Scheme provides for the disclosure of some insurance information including details of the insurer, the policy number and details of the type of insurance (building and public liability).

### 5.3. Gold Coast City Council Local Law

The introduction of the *Gold Coast City Council Local Law No. 17 (Maintenance of Works in Waterway Areas) 2013*<sup>91</sup> (**GCCC Local Law**) in 2013 and the potential problems associated with this local law was discussed in some detail in the Issues Paper. 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.

It is not proposed to include the GCCC Local Law into the statutory seller disclosure regime. The primary reason for excluding the law is that, as illustrated in the Issues Paper, the GCCC Local Law is unable to meet the guiding principles (and disclosure regime objectives) which are used as the benchmark for the seller disclosure regime (see Recommendation 2). Further, 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. 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.

In order to address these issues, seller disclosure in Queensland should only occur within the framework of the statutory regime proposed under the PLA (and the BCCM Act, where applicable). Any future revisions or additions should occur within this framework.<sup>92</sup>

**Recommendation 18: Seller disclosure in Queensland should only occur within the framework of the statutory regime proposed under the PLA (and the BCCM Act, where applicable). Any future revisions or additions should occur within this framework.**

## 6. Accuracy and currency of information and continuing disclosure

There is no requirement in Queensland in relation to the currency of information required to be disclosed under statute or contract.<sup>93</sup> This is consistent with the approach adopted in the other jurisdictions that have a statutory disclosure regime in place.<sup>94</sup> The QLS indicated that provided there

<sup>91</sup> Note also the subordinate law, Local Law 17.1 (Works in Non Coastal Waterway Areas) 2013.

<sup>92</sup> Disclosure requirements for sales of proposed allotments and proposed lots will remain under the *Land Sales Act 1984* (Qld) and *Body Corporate and Community Management Act 1997* (Qld). See Part 2.2 above for further discussion on proposed allotments and lots.

<sup>93</sup> However, section 206(2)(b) of the *Body Corporate and Community Management Act 1997* (Qld) requires the disclosure statement to include the amount of annual contributions **currently** fixed by the Body Corporate as payable by the owner of the lot.

<sup>94</sup> Note the qualification in the case of the Australian Capital Territory where pest and building reports must be based on inspections carried out no earlier than 3 months before the property was listed for sale and the

is a limited currency period for the seller's statement, there should not be any other obligation to update the statement prior to completion, unless the seller becomes aware of an inaccuracy.<sup>95</sup>

Termination rights do exist under the BCCM Act in relation to inaccurate information contained in a disclosure statement for an existing lot<sup>96</sup> (as at the date of contract) and in relation to a proposed lot.<sup>97</sup> There are no other accuracy obligations imposed. This is also generally consistent with the approach in the other jurisdictions. The QLS also does not consider that the seller should be responsible for inaccuracies in information provided by statutory authorities.<sup>98</sup>

In order for a seller statement to have value as a disclosure document, a buyer should be able to rely on it as being accurate. In this respect, the proposed Queensland statutory disclosure regime should include a provision which provides that the buyer is able to rely on the accuracy of the information contained in the disclosure statement as at the date of contract. This approach is the same as that provided for under the BCCM Act in relation to existing lots. Remedies for an inaccurate statement are set out in Part 7 below.

Continuing disclosure obligations potentially impact on the transaction costs of a conveyance.<sup>99</sup> The QLS submits that imposing an obligation on the seller to update a disclosure statement prior to the completion would be an unnecessarily complex, costly and create contractual uncertainty for the seller.<sup>100</sup> The submissions support a statutory disclosure framework that does not impose continuing disclosure obligations.<sup>101</sup> There is currently no continuing disclosure obligations imposed under legislation in Queensland or the other jurisdictions, apart from South Australia where there is a requirement for a fresh statement to be provided in certain circumstances and within a limited time period.<sup>102</sup> It has been suggested that much of the information that is likely to change between contract and settlement is material held by local councils. As a result, sellers would need to pay additional fees to check the information if they were required to provide continuing disclosure under a statutory disclosure regime.<sup>103</sup>

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proposed regime in Tasmania where some government certificates must not be more than 9 months old before the date on which the contract is made.

<sup>95</sup> Queensland Law Society, above n 5, 8. The other submissions did not comment on this issue.

<sup>96</sup> *Body Corporate and Community Management Act 1997* (Qld) s 209.

<sup>97</sup> *Body Corporate and Community Management Act 1997* (Qld) s 214.

<sup>98</sup> The Queensland Law Society suggest a warranty approach to currency and accuracy where the warranty should be limited to the fact that information given is a true and complete copy of what was provided by the authority (where applicable) or is a true reflection of the information obtained.

<sup>99</sup> Christensen et al, above n 39, 171

<sup>100</sup> Queensland Law Society, above n 5.

<sup>101</sup> The Property Council of Australia does not support any extension to the current 'ongoing' statutory disclosure obligations in Queensland. In its view, the 'fresh statement' approach (see South Australia) would require a seller to onerously monitor the circumstances outlined within the statement until contract settlement. The Queensland Law Society considers that the buyer should generally take the risk of a change after the date of the contract. The reality of all disclosure regimes is that, in practice, buyers usually want to test the validity of at least some of the information provided by a seller by making their own inquiries and undertaking their own searches. Even if the buyer is not interested in doing this, a seller's mortgagee is. It is inevitable that there will be some duplication of searching in any conveyancing process.

<sup>102</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 10.

<sup>103</sup> Christensen et al, above n 39, 172-173.

A seller who becomes aware of an inaccuracy prior to the contract being entered into should, however, be able to rectify the inaccuracy by appropriate disclosure in the contract. This can be achieved by disclosing the relevant information as a term of the contract. A buyer has no remedy if appropriate disclosure is made in the contract.

**Recommendation 19: The buyer may rely on information in the disclosure statement as if the seller had warranted its accuracy.**

**Recommendation 20: The statutory disclosure regime in Queensland should not require continuing disclosure.**

**Recommendation 21: A seller who becomes aware of an inaccuracy in the seller statement (or body corporate certificate) is able to rectify the inaccuracy by appropriate disclosure in the contract.**

## 7. Remedies

It is clear from the Issues Paper that there is no uniform approach in Queensland in relation to the available remedies under the existing legislation imposing disclosure obligations. Further, there is no consistency in terms of the terminology used, the type of remedy, the timing and the effect of the remedy. The difficulty of identifying relevant remedies in Queensland was highlighted as an issue in some of the submissions and there was strong support for a single co-ordinated regime for remedies.<sup>104</sup> The QLS consider that current remedies in Queensland are not appropriate as contracts may be terminated for technical non-compliance whether or not buyers were adversely affected or whether the non-compliance was known to the buyer.<sup>105</sup> The PCA supports a remedies structure that is proportionate to the severity of the seller's breach, in addition to including a 'make good' period during which a contract is not terminated if a seller can rectify the non-compliance. The PCA does not support the remedy frameworks in New South Wales, Victoria or the ACT which allows a buyer to rescind the contract of sale.<sup>106</sup>

The QLS considered that termination should only be available where the buyer is adversely affected and that a materiality test is probably not required.<sup>107</sup>

The proposed statutory disclosure regime will require consistent and clear remedies for clearly identified contraventions of the obligations imposed.

### 7.1. Contravention categories and remedies

The possible contravention categories under the proposed statutory disclosure regime are:

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<sup>104</sup> See for example, the Queensland Law Society submission, above n 5. The REIQ submission indicates support for a framework that unifies disclosure obligations, remedies and time-frames and uses consistent terminology.

<sup>105</sup> Queensland Law Society, above n 5.

<sup>106</sup> Property Council of Australia, above n 6.

<sup>107</sup> Queensland Law Society submission, above n 5.



- Failing to have the seller statement and body corporate certificate available, in the case of residential property, from the time the property is offered for sale;
- Failing to give the buyer the seller statement as required under the relevant statutory provision;
- Breach of seller statutory warranties.

The proposed remedies for each of these categories are discussed in further detail below.

### **7.1.1. Failing to have the seller statement and body corporate certificate available, in the case of residential property, from the time the property is offered for sale**

An offence provision imposing a civil penalty should be incorporated into the regime to cover the situation where the seller or agent does not make the seller statement available. The imposition of this type of sanction provides a deterrence mechanism and recognises the consumer protection role that seller disclosure provides. As indicated in Option 2 in Part 4.1 above, the requirement of earlier disclosure only applies to residential property. A seller should be excused from making the statement available when the property is offered for sale in very limited circumstances. These might include:

- related party transactions – such as parent and subsidiary companies or partnerships;
- Court ordered sales – for example, a Family Court ordered sale or a sale by the Sheriff;
- Where the prospective buyer is the State or a statutory body;
- The buyer is a publicly listed company.

These exceptions could be framed as defences (or excuses) to the offence of failing to make the seller statement available at the time the property is offered for sale.

**Recommendation 22: Failure by the seller or agent to make the seller statement available from the time the residential property is offered for sale is an offence.**

**Recommendation 23: A defence or excuse to the offence may arise :**

- **in related party transactions – such as parent and subsidiary companies or partnerships;**
- **in Court ordered sales – for example, a Family Court ordered sale or a sale by the Sheriff;**
- **where the prospective buyer is the State or a statutory body; and**
- **where the prospective buyer is a publicly listed company.**

### **7.1.2. Failing to provide the seller statement to the buyer**

Under the proposed statutory disclosure regime, sellers are required to provide the seller statement to the buyer. Failing to provide the statement constitutes a serious contravention of the legislation and would place the buyer at a significant disadvantage during a sale process. The other Australian jurisdictions with statutory disclosure regimes (apart from South Australia) allow a buyer to rescind the contract in the prescribed circumstances, including where the relevant disclosure obligations have not been met. The South Australian model allows a buyer to apply to a Court of competent jurisdiction for a relevant order.

Rescission as a remedy allows the parties to return to the position they had been in prior to entering the contract. This means that the buyer should be entitled to the refund of any money paid in relation to the sale. As a general rule rescission under other regimes is available up until settlement. In order to avoid uncertainty in the case of sales with longer settlement periods, rescission should only be available for 21 days after the contract has been entered into or up to the time of settlement, whichever is earlier. Failing to provide a statutorily required seller statement would constitute a serious contravention of the legislation and allowing a buyer to rescind a contract is an appropriate response.

**Recommendation 24: Rescission should only be available for 21 days after the contract has been entered into or up to the time of settlement, whichever is earlier.**

**Recommendation 25: A buyer has an unfettered right to rescind if the seller fails to provide the seller statement required under the legislation.**

**Recommendation 26: Where rescission arising under Recommendation 25 occurs, the seller disclosure provision should expressly provide for the return of any money paid by the buyer in relation to the conveyance. Any outstanding money should be deemed recoverable as a debt.**

### 7.1.3. Breach of statutory warranties

The statutory warranties proposed under the disclosure regime comprise:

- the existing disclosure material currently required in Queensland;
- the additional disclosure material identified in Part 5 above; and
- the accuracy and correctness of the disclosure made.

A buyer should be able to rescind a contract where a statutory warranty has been breached. However, subject to some exclusions discussed in Part 7.2 below, the right to rescind for a breach of a statutory warranty should be qualified to apply only where the contravention has an adverse effect on the buyer, rather than being available for technical non-compliance. This qualification should not apply to a breach where the seller fails to provide the statement. In that instance, the buyer should have an unfettered right to rescind under the regime.

In Victoria, the availability of rescission generally is limited if the:

- Seller has acted honestly and reasonably and ought fairly be excused for the contravention; and
- The buyer is substantially in as good position as if the seller complied with his or her disclosure obligations.<sup>108</sup>

However, the approach adopted in New South Wales is more consistent with the approach in Queensland more generally in relation to rescission rights. Under the New South Wales model the following conditions must be satisfied before the remedy is available:

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<sup>108</sup> *Sale of Land Act 1962 (Vic) s 32(7)*.

- The breach constitutes a failure to disclose to the buyer the existence of the matter affecting the land;
- The buyer was unaware of the existence of the matter when the contract was entered into; and
- The buyer would not have entered into the contract had she or he been aware of the matter.<sup>109</sup>

This test is different to the material prejudice test which includes both an objective and subjective component. The material prejudice test is arguably inappropriate in the context of seller disclosure as a seller is often unaware of issues which may be critical to a buyer but not identified anywhere during the sale process.<sup>110</sup> The approach proposed above is an objective test and avoids this problem and arguably provides a better balance between seller and buyer rights.

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

**Recommendation 27: A buyer is entitled to rescind the contract where a seller statutory warranty has been breached by the seller, subject to the limits imposed under Recommendation 28.**

**Recommendation 28: The buyer's right to rescind for a breach of a statutory warranty is only available if:**

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

**Recommendation 29: Where rescission arising under Recommendation 27 occurs, the seller disclosure provision should expressly provide for the return of any money paid by the buyer in relation to the conveyance. Any outstanding money should be deemed recoverable as a debt.**

## **7.2. Consistency between remedies under proposed disclosure regime and existing regime**

The proposed statutory regime requires the seller to provide warranties in relation to the existence of following matters:

- Undischarged coastal protection or tidal works notice (required currently under the *Coastal Protection and Management Act 1995* (Qld) (s 65);
- Contaminated land recorded in the environmental register and other disclosures required under the *Environmental Protection Act 1994*(Qld) (s421, 347 and 362);
- Tree applications and orders (required under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*(Qld); and

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<sup>109</sup> *Conveyancing (Sale of Land) Regulation 2010* (NSW) reg 16(3).

<sup>110</sup> See for example *Mirvac Queensland Pty Ltd v Wilson* [2010] QCA 322.

- A proposal by an authority to alter the dimensions of any transport infrastructure or locate transport infrastructure on the land (required under clause 7.7 of the REIQ standard residential and community titles lot scheme contracts).

Currently under the different Acts that govern these matters, a buyer is able to rescind (or 'terminate') a contract of sale if these matters are not disclosed without establishing that the buyer has been affected by the failure to disclose this information. Under the proposed statutory regime, failure to disclose this information by way of exception to a statutory warranty would qualify as an incomplete (or arguably inaccurate) disclosure. A buyer can rescind a sale contract in those circumstances only if the test in Recommendation 28 is satisfied. This creates an inconsistency between the available remedies under those Acts (and contract) and the proposed statutory disclosure regime.

The issue could be resolved by either deeming the failure to provide one or more of those identified categories of information as:

- 'non-disclosure' which means that rescission is available without qualification; or
- satisfying the test in Recommendation 28, with the effect that rescission is also immediately available without having to consider those matters.

**Recommendation 30: A deeming provision be included in the statutory seller disclosure regime with the effect that the failure to disclose in the seller statement information regarding:**

- **Undischarged coastal protection or tidal works notice;**
- **Contaminated land recorded in the environmental register and other disclosures required under the *Environmental Protection Act 1994 (Qld)*;**
- **Tree applications and orders under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)*;**
- **A proposal by an authority to alter the dimensions of any transport infrastructure or locate transport infrastructure on the land;**

**is either:**

- **Non-disclosure of the seller statement; or**
- **Automatically satisfies the threshold test for rescission.**

**The buyer in this situation will be able to rescind the contract with no further qualification.**

## 8. Contracting out of the statutory disclosure regime

Both the QLS and PCA support a regime which allows some limited capacity to contract out of the disclosure obligations where independent legal advice has been obtained by the buyer.<sup>111</sup> This is contrary to the approach taken in the other Australian jurisdictions (apart from the proposed regime in Tasmania) where the contracting out of the disclosure obligation is prohibited.

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<sup>111</sup> The Property Council of Australia supports a provision similar to that proposed in Tasmania in the Residential Property Transactions Bill 2013 (Tas) cl 27(2) which enables parties to contract out of the disclosure obligations in the limited situation where legal advice has been obtained by the buyer and this is certified by the relevant practitioner: Property Council of Australia, above n 6.

Incorporating a provision into the Queensland statutory disclosure regime which prohibits contracting out of the disclosure obligations provides certainty and transparency for both buyers and sellers. It also addresses a key concern of the existing regime that sellers can currently avoid the disclosure obligations by contracting out of them. There may be some limited situations where it is appropriate to exclude certain transactions from the regime. However, this issue is discussed in further detail in Part 9 below.

**Recommendation 31: Contracting out of the statutory seller disclosure regime be expressly prohibited and any provision to this effect in a contract for the sale of land is void and of no effect.**

## 9. Exclusions from the statutory disclosure regime

There will be certain sale contracts which are appropriate to exclude from the statutory disclosure regime for a number of reasons including where the parties are related. Although there is some variation in the submissions regarding the categories of contracts that should be excluded from a seller disclosure regime, there is a common theme that some exclusion categories should be provided for in the regime. Both the PCA and the QLS supported the exclusion of contracts for sale involving sophisticated buyers and large scale transactions. Other suggested categories included sales by Court order or by the registered or official trustee under the *Bankruptcy Act 1966* (Cth).<sup>112</sup>

Three of the Australian jurisdictions that have a statutory seller disclosure regime in place exclude some categories of contract from the disclosure obligations under the regime.<sup>113</sup> The proposed statutory scheme for Queensland is intended to be inclusive in that is proposed to apply to all freehold land. Accordingly, it may be necessary to exclude some transactions from the regime. However, the exclusion categories should be the same as the categories which are excused from providing the earlier disclosure discussed in Part 7.1 above. These categories are:

- related party transactions – such as parent companies and subsidiaries or partnerships;
- Court ordered sales – for example, a Family Court ordered sale or a sale by the Sheriff;
- Where the prospective buyer is the State or a statutory body;
- The buyer is a publicly listed company.

In the case of mortgagees exercising powers of sale, searches would usually need to be undertaken in order for the mortgagee to complete the seller statement. It is difficult to see any reason in principle which would justify mortgagees being excluded from the obligation to make the required disclosures. The information required is readily available at a reasonable cost. Further, it is a duty of a mortgagee in the exercise of a power of sale to take reasonable care to ensure that the property is sold at market

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<sup>112</sup> See the Property Council of Australia, above n 6, 5.

<sup>113</sup> See New South Wales (which has a number of exclusion categories), Australian Capital Territory (which has a more restrictive regime) and the proposed regime in Tasmania (which is similar to New South Wales). South Australia and Victoria do not have exclusion categories, although section 32 of the *Land and Business (Sale and Conveyancing) Act 1994* (SA) does not expressly create exclusion categories. However, it provides the Minister with discretion, upon application by a person, to exempt a person from a specified provision of the Act. Any grant of an exemption must be notified in the Gazette.

value.<sup>114</sup> It is arguable that part of discharging this duty includes undertaking relevant due diligence in relation to the property which would cover most of the required disclosures in any event.

**Recommendation 32: Exclusion categories should be included into the disclosure regime. These are:**

- **Related party transactions – such as parent companies and subsidiaries or partnerships;**
- **Court ordered sales – for example, a Family Court ordered sale or a sale by the Sheriff;**
- **Where the prospective buyer is the State or a statutory body; and**
- **The buyer is a publicly listed company.**

## 10. Accessing information

The submissions support the development of an online ‘one-stop’ shop that provides access to relevant government departmental and local council information.<sup>115</sup> The PCA indicated that a single point of information provides both parties with a reasonable opportunity to meet required deadlines and provide an avenue for unsophisticated buyers to better understand the additional information that is of value to them.<sup>116</sup> The QLS strongly supports the development of a single property information gateway for access to all government information, ideally with all information collated and summarised in a single report form.<sup>117</sup>

The Queensland Competition Authority (QCA) considered the possibility of a ‘one-stop shop’ as a mechanism to eliminate duplication. The QCA indicated that a reduction or elimination of duplication would eliminate burden without eliminating regulatory effect.<sup>118</sup> Further investigation of whether it is possible to better use technology to enable a greater coordination and potentially, single search portal for government information should be undertaken.<sup>119</sup>

**Recommendation 33: Further investigation of the potential to develop a ‘one-stop shop’ for state and local government disclosure information should be undertaken.**

## 11. Recommendation for statutory disclosure regime

This Interim Report has considered a number of different options for the various components that make up a seller disclosure regime and made recommendations in relation to those. The result of the analysis undertaken in this paper is a statutory seller disclosure regime which will require a new

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<sup>114</sup> *Property Law Act 1974* (Qld) s85(1). In certain prescribed cases, this duty extends to obtaining reliable evidence of the property value and maintaining the property including undertaking repairs and maintenance: s 85(1A).

<sup>115</sup> See specifically the Property Council of Australia, above n 6 and the Queensland Law Society, above n 5. Note also the submission from John McDonald of Robinson & Robinson Lawyers & Notary Public which expressed support for a central agency to assist with the provision of government information.

<sup>116</sup> Property Council of Australia, above n 6, 3.

<sup>117</sup> Queensland Law Society, above n 5, 3.

<sup>118</sup> Queensland Competition Authority, *Measuring and Reducing the Burden of Regulation Final Report* (2013), 53-54.

<sup>119</sup> *Ibid* 54.

provision or provisions to be inserted into the PLA to create a single disclosure regime for all freehold land in Queensland, subject to some limited exceptions.

The proposed regime will require changes to the form in which existing seller disclosure for land is undertaken in Queensland, although it will not impact significantly on the content of the current disclosures required. Some key features of the regime include:

- The seller statement (and body corporate certificate) must be made available to prospective buyers of residential property from the time the property is offered for sale. Failure to provide the statement at this time is an offence. Certain exceptions may be available to this requirement. For example, where the seller and prospective buyer are related parties;
- A seller must provide the statement to the buyer before the buyer enters into the contract (this does not require the seller to make disclosure on two separate occasions);
- Disclosure (including community title) will be in the form of:
  - Statutory warranties incorporated into the new PLA provision which will capture most current disclosures required in Queensland,<sup>120</sup> in addition to some new ones. The statutory warranties set out in s 223 of the BCCM Act will remain;
  - Seller statement in the form set out at **Attachment D**;
  - Body corporate certificate if the property falls within the scope of the BCCM Act. The certificate incorporates the disclosures currently required under section 206 of the BCCM Act and the information which can be provided upon request under section 205. A sample of the proposed body corporate certificate is at **Attachment E**; and
- A buyer is able to rescind the contract for non-compliance with the requirement to provide a seller statement (and body corporate certificate where applicable) and breaching a statutory warranty, subject to some qualifications and exceptions.

The content of the seller statement will only include information that the seller is unable to provide in the form of a statutory warranty – that is, exceptions to the statutory warranties which will be set out in the PLA. A number of the disclosure obligations in the form of warranties under the REIQ Contracts for Houses and Residential Land and Lots in a Community Titles Scheme will be relocated as statutory warranties. See for example the heritage listing disclosure obligation which is currently a warranty in the contract.

Amendments will be required to the existing statutory disclosure provisions under the various Acts and the BCCM Act if this approach is adopted.

**Recommendation 34: That a statutory disclosure regime comprising a number of statutory warranties, disclosure of a seller statement and body corporate certificate (where applicable) be enacted in Queensland.**

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<sup>120</sup> Amendments will be required to all the Queensland legislation which currently requires seller disclosure to avoid duplication of the disclosure obligation and confusion in relation to available remedies for non-compliance under those Acts.

## Resources

### A. Article/Books/Reports

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

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

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

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

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

Department of Natural Resources and Mines, *Queensland Government response to the Inquiry into the Future and Continued Relevance of Government Land Tenure across Queensland* (2013)

Dixon, B, 'Queensland Court of Appeal Opines on the Meaning of "Material Prejudice"' (2011) 31 *The Queensland Lawyer* 5

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

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

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

### B. Cases

*Mirvac Queensland Pty Ltd v Wilson* [2010] QCA 322

### C. Legislation

#### Australian Capital Territory

*Civil Law (Sales of Residential Property) Act 2003* (ACT)

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

#### New South Wales

*Conveyancing Act 1919* (NSW)

*Conveyancing (Sale of Land) Regulation 2010* (NSW)



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Queensland

*Body Corporate and Community Management Act 1997* (Qld)

*Fire and Rescue Service Act 1990* (Qld)

*Land Sales and Other Legislation Amendment Act 2014* (Qld)

Land Sales and Other Legislation Amendment Bill 2014 (Qld)

*Property Occupations Act 2014* (Qld)

South Australia

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

*Land and Business (Sale and Conveyancing) Regulation 1995* (SA)

Tasmania

Residential Property Transactions Bill 2013 (Tas)

Victoria

*Sale of Land Act 1962* (Vic)

*Sale of Land Amendment Act 2014* (Vic)

Sale of Land Amendment Bill 2014 (Vic)

*Sale of Land Regulations 2005* (Vic)

**D. Other**

Ashton, Heath and Alicia Wood, 'Calls for Building Inspectors to be licensed', *Sydney Morning Herald* (online), accessed 24 June 2014 <http://smh.domain.com.au/calls-for-building-inspectors-to-be-licensed-20110813-1irxy.html>

Banking Code of Practice 2013

Explanatory Notes, Land Sales and Other Legislation Amendment Bill 2014 (Qld)

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

REIQ Contract for Houses and Residential Land

REIQ Contract for Residential Lots in a Community Titles Scheme

## Attachment A – Option 1 Seller Statement

**WARNING**

*You must be aware that there are some important matters the Seller is not required by this Statement to disclose to you and it is in your interest to undertake further investigations of such matters. These matters include:*

- *The structural soundness of the building and pest information;*
- *Flooding history;*
- *Building approvals; and*
- *Limits on the use of the lot imposed by planning laws.*

*You should consult a lawyer to assist you to investigate these and other matters properly before you sign a contract.*

<b>SELLER AND PROPERTY DETAILS</b>	Seller Name:			
	Property Address:			
	Title reference:			
	Is this a community titles lot scheme?	No	Yes	Attach copy of body corporate certificate.

<b>ENCUMBRANCE</b>	Is the lot subject to a lease or a tenancy?	No	Yes	Term: Any option: Expiry:
	Is there a statutory easement (for example a high density development easement) affecting the lot?	No	Yes	Provide copy.
	Is there a registered easement affecting the lot?	No	Yes	Provide copy
	Is there a Building Management Statement registered over the lot?	No	Yes	Details:
	Are there any other encumbrances which will not be released at settlement? For example, infrastructure charges?	No	Yes	Details:
	Profit a prendre or statutory covenant?	No	Yes	Details:

<b>USE &amp; ENJOYMENT</b>	Is the lot entered in the Queensland Heritage Register or a Local Heritage Register?	No	Yes	Details:
	Is the lot subject to a Vegetation Protection Order?	No	Yes	Details:
	Does the lot fall within a property map of assessable vegetation (PMAV)?	No	Yes	Details:
	Services infrastructure connected to the lot?			<b>Circle</b> <ul style="list-style-type: none"> <li>• Electricity</li> <li>• Water</li> <li>• Sewerage</li> </ul>
	Is there a resource authority affecting the lot (eg mining lease, petroleum tenure) or a land access agreement or conduct and compensation agreement affecting the lot related to a resource authority?	No	Yes	Details:
	Is the land affected by a proposal by an authority to alter the dimensions of any transport infrastructure or locate transport infrastructure on the lot?	No	Yes	Details:

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	For a commercial property, is there a certificate of classification?	No	Yes	Details:
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<b>DISCLOSURES REQUIRED UNDER QLD ACTS</b>	<b>Contaminated Land</b>			
	Is the lot recorded in the environmental or contaminated land register?	No	Yes	Provide details of any site management plan in place.
	Is the lot subject to any other order or notice under the <i>Environmental Protection Act 1994 (Qld)</i> ?	No	Yes	Details:
	<b>Unlicensed Building Works</b>			
	Has building work been carried out on the lot by a person who is not licensed to carry out that work within the last 6 years?	No	Yes	If yes, attach the notice required under the <i>Queensland Building and Construction Commission Act 1991 (Qld)</i>
	<b>Tree orders and applications</b>			
	Is the lot affected by an application to the Queensland Civil and Administrative Tribunal (QCAT) in relation to a tree situated on the lot?	No	Yes	Application attached.
	Is the lot affected by an order by QCAT in relation to a tree situated on the lot?	No	Yes	Order attached.
	<b>Swimming Pools</b>			
	Is there a swimming pool (shared or non-shared) located on the lot?	No	Yes	If yes, pool safety certificate attached. If no, Form 36 'Notice of no pool safety certificate' attached.
	<b>Smoke Alarms</b>			
	Has a compliant smoke alarm been installed in the residence on the lot?	No	Yes	
	<b>Safety Switches</b>			
	Has an approved safety switch for general purpose socket-outlets been installed in the residence on the lot?	No	Yes	
<b>Coastal Protection</b>				
Is the lot (or works) the subject of an undischarged coastal protection or tidal works notice?	No	Yes	Notice attached.	

<b>COURT PROCESSES AND ORDERS</b>	Are there any judgments, court orders or writs issued from a Court or Tribunal which affect the lot?	No	Yes	Details:
	Are there any current Court or Tribunal claims, notices or proceedings that may lead to a judgment, order or writ which affect the lot.	No	Yes	Details:
	Are there any threatened claims, notices or proceedings in a Court or Tribunal that may lead to a judgment, order or writ which may affect the lot?	No	Yes	Details:
	Has an enforcement warrant been issued from a Court in relation to the lot?	No	Yes	Details:

NOT GOVERNMENT POLICY

<b>NOTICES AND ORDERS – STATE OR LOCAL AUTHORITY</b>	Is there a notice or order requiring work to be done or money spent in relation to the lot?	No	Yes	Details:
	Is there a show cause or enforcement notice issued by a local government or state authority?	No	Yes	Details:
	Is there a current notice intention to resume any part of the lot?	No	Yes	Details:

The seller warrants the accuracy of the information contained in this statement.

**Signature of seller:**

**Date:**

## Attachment B – Option 2 Seller Statement

### **WARNING**

*You must be aware that there are some important matters the Seller is not required by this Statement to disclose to you and it is in your interest to undertake further investigations of such matters. These matters include:*

- *The structural soundness of the building and pest information;*
- *Flooding history;*
- *Building approvals; and*
- *Limits on the use of the lot imposed by planning laws.*

*You should consult a lawyer to assist you to investigate these and other matters properly before you sign a contract.*

#### **Seller and Property Details**

Seller Name:

Property Address:

Title reference:

Is this a community titles lot scheme?	No	Yes	Attach copy of body corporate certificate.
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<b>1.</b>	<b>Title</b>		
	A person other than the seller has an interest affecting the title to the lot, which will remain after settlement.	<b>No</b>	<b>Yes -Part 1</b>
<b>2.</b>	<b>Buildings and Improvements</b>		
	There are statutory requirements you will have to comply with for the building on the lot.	<b>No</b>	<b>Yes - Part 2</b>
	Services infrastructure (electricity, water and sewerage) are not connected to the lot.	<b>No</b>	<b>Yes – Part 2</b>
<b>3.</b>	<b>Land use restrictions</b>		
	Your use of the lot is restricted by legislation.	<b>No</b>	<b>Yes - Part 3</b>
<b>4.</b>	<b>Requirements of government and court proceedings</b>		
	As the owner of the lot there are current notices, orders or court proceedings affecting the lot you will have to comply with.	<b>No</b>	<b>Yes - Part 4</b>
<b>5.</b>	<b>Rights of third parties to use the lot</b>		
	A person other than the seller has legal rights which will affect the use of the lot by you	<b>No</b>	<b>Yes -Part 5</b>
<b>6.</b>	<b>The property is a lot in a community titles scheme</b>		
	The property is a lot in a community titles scheme?	<b>No</b>	<b>Yes - Part 6</b>

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PART 1 - TITLE			
Lease or tenancy	No	Yes	Term: Any Option: Expiry Date:
Registered easement?	No	Yes	Copy attached.
Statutory easement (eg high density development easement)?	No	Yes	Copy attached.
Building Management Statement registered over the lot?	No	Yes	Details:
Other encumbrances not to be released at settlement (eg infrastructure charges).	No	Yes	Details:
Profit a prendre or statutory covenant?	No	Yes	Details:

PART 2 – BUILDINGS AND IMPROVEMENTS			
Swimming pool (shared or non-shared) on the lot?	No	Yes	If yes, pool safety certificate attached. If no, Form 36 'Notice of no pool safety certificate' attached.
Compliant smoke alarm installed in the residence?	No	Yes	
Approved safety switch for general purpose socket-outlets installed in the residence?	No	Yes	
Building work has been carried out by a person who is not licensed to carry out the work within the last 6 years?	No	Yes	Notice in form required under the <i>Queensland Building and Construction Commission Act 1991</i> (Qld) attached.
Services infrastructure not connected to the lot?			Circle: <ul style="list-style-type: none"> <li>• Electricity</li> <li>• Water</li> <li>• Sewerage</li> </ul>
Certificate of classification (for commercial property)?	No	Yes	Details:

PART 3 – LAND USE RESTRICTIONS			
<b>Note: This does not include any limits imposed under the relevant planning scheme applicable to the property you are purchasing. It is up to you to make further inquiries regarding the information contained within this statement, including land use limits, where you consider that it is appropriate or required.</b>			
Lot recorded in the environmental or contaminated land register?	No	Yes	Details (including any site management plan in place).
Lot entered in the Queensland Heritage Register or a Local Heritage Register?	No	Yes	Details:
Lot within a property map of assessable vegetation (PMAV)?	No	Yes	Details:
Vegetation Protection Order?	No	Yes	Details:

PART 4 – REQUIREMENTS OF GOVERNMENT AND COURT PROCEEDINGS			
<b>State or Local Government/Authority notice or order:</b>			
<ul style="list-style-type: none"> <li>• Requiring work to be done or money spent in relation to the lot?</li> </ul>	No	Yes	Details:
<ul style="list-style-type: none"> <li>• Show cause or enforcement notice?</li> </ul>	No	Yes	Details:
<ul style="list-style-type: none"> <li>• Intention to resume any part of the lot?</li> </ul>	No	Yes	Details:
<ul style="list-style-type: none"> <li>• Undischarged coastal protection or tidal works notice?</li> </ul>	No	Yes	Notice attached.
<ul style="list-style-type: none"> <li>• Any other order or notice under the <i>Environmental Protection Act 1994</i> (Qld)?</li> </ul>	No	Yes	Notice attached.

NOT GOVERNMENT POLICY

<b>Court and Tribunal matters which affect or may affect the lot:</b>			
• Judgments, court orders or writs issued?	No	Yes	Details:
• Current or threatened claims, notices or proceedings that may lead to a judgment, order or writ?	No	Yes	Details:
• Enforcement warrant?	No	Yes	Details:
• Queensland Civil and Administrative Tribunal (QCAT) application in relation to a tree situated on the land?	No	Yes	Application attached.
• QCAT order in relation to a tree situated on the land?	No	Yes	Order attached.

**PART 5 – RIGHTS OF THIRD PARTY TO USE LAND**

Is there a resource authority affecting the lot (eg mining lease, petroleum tenure) or a land access agreement or conduct and compensation agreement affecting the lot related to a resource authority?	No	Yes	Details:
Proposal by an authority to alter the dimensions of any transport infrastructure or locate transport infrastructure on the lot?	No	Yes	Details:

**PART 6 – COMMUNITY TITLE**

The property is a lot in a community titles scheme?	No	Yes	Body Corporate Certificate attached
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The seller warrants the accuracy of the information contained in this statement.

**Signature of seller:**

**Date:**

## Attachment C – Option 3 Seller Statement

**WARNING**

*You must be aware that there are some important matters the Seller is not required by this Statement to disclose to you and it is in your interest to undertake further investigations of such matters. These matters include:*

- *The structural soundness of the building and pest information;*
- *Flooding history;*
- *Building approvals; and*
- *Limits on the use of the lot imposed by planning laws.*

*You should consult a lawyer to assist you to investigate these and other matters properly before you sign a contract.*

**PART 1 – SELLER DISCLOSURE**

**NOTICE TO THE BUYER**

This Statement contains important information about matters that the Seller may be required to disclose to you.

If the Seller answers ‘Yes’ below, it means that all statements in Part 2 are correct.

If the Seller answers ‘No’ below, it means that the Seller is unable to make one or more of the statements in Part 2 and is required to make disclosure of those matters to you.

If you have any concerns or questions about any disclosure made by the Seller, you should consult with a lawyer before signing a contract.

**Seller and Property Details**

Seller Name:

Address:

Title reference:

Is this a community titles lot scheme?	No	Yes	Attach copy of community titles certificate.
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**Seller Disclosure**

Are all statements in Part 2 correct?

Yes

No. If no, insert any information relevant to the particular statement/s in Part 2 below that the Seller is unable to provide. If insufficient space, attach additional pages.

The Seller warrants the accuracy of the information contained in this statement.

**Signature of Seller:**

**Date:**



**PART 2 – SELLER WARRANTIES**

**NOTICE TO THE SELLER**

**By giving this statement to a prospective buyer you will be warranting that the statements below are correct, except as disclosed in Part 1 above. If a warranty is incorrect and you fail to make the disclosure required, you may be liable to compensate the buyer and the buyer may have a right to terminate the contract under the *Property Law Act 1974 (Qld)*.**

**Title**

- The lot is not subject to a lease or tenancy.
- The lot is not affected by a registered easement.
- The lot is not affected by a statutory covenant or a profit a prendre.
- The lot (other than a community titles scheme lot) is not affected by a statutory easement.
- There are no other registered or statutory encumbrances (eg infrastructure charges) affecting the lot which will not be released at settlement.
- There is no Building Management Statement registered over the lot.

**Buildings and improvements**

- Building work has not been carried out on the lot by a person who is not licensed to carry out that work within the last six years.
- A Pool Safety certificate has been issued in relation to the swimming pool on the lot (**Note:** if not issued, Form 36 must be attached to this statement).
- A compliant smoke alarm and an approved safety switch has been installed in the residence on the lot.
- Electricity, water and sewerage are connected to the lot.
- A certificate of classification exists for the building (this does not apply to a dwelling house).

**Land use restrictions**

- The lot is not recorded in the environment or contaminated land register or subject to any other order or notice under the *Environmental Protection Act 1994 (Qld)*.
- The lot is not entered in the Queensland Heritage Register or a Local Government Heritage Register.
- The lot is not affected by a Vegetation Protection Order and does not fall within a property map of assessable vegetation (PMAV).
- The lot (or works) is not subject to an undischarged coastal protection or tidal works notice.
- No notice or order requiring work to be done or money spent in relation to the lot has been issued.
- No show cause or enforcement notice issued by a local government or state authority.
- There is no current notice of intention to resume any part of the lot.

**Requirements of government and court proceedings**

- There are no unsatisfied judgments, court orders or writs issued from a Court or Tribunal which affect the lot.
- There are no current or threatened Court or Tribunal claims, notices or proceedings that may lead to a judgment, order or writ which may affect the lot.
- No enforcement warrant has been issued from a Court in relation to the lot
- There is no application to QCAT in relation to trees situated on the lot and no order has been issued from QCAT in relation to a tree situated on the lot.
- There are no current Court or Tribunal claims, notices or proceedings that may lead to a judgment, order or writ which affect the lot.

**Rights of third parties to use land**

- There is no proposal to alter a government road, rail or port which will affect the lot.
- There is no resource authority affecting the lot (eg mining lease, petroleum tenure) or a land access agreement or conduct and compensation agreement affecting the lot related to a resource authority.

NOT GOVERNMENT POLICY  
**Attachment D – Option 4 Seller Statement**

**NOTICE TO THE BUYER**

**This Statement contains important information the Seller is required to disclose to you.  
 If the Seller answers ‘Yes’ it means the statement is correct.  
 If the Seller answers ‘No’ the Seller must disclose the reason why the statement is not correct.  
 If you have any concerns or questions about the information in this Statement, you should consult a lawyer before signing a contract.**

Property Details	
Address:	
Title reference:	A copy of the current title is attached.

**THE SELLER MUST ANSWER ‘YES’ IF THE STATEMENT IS CORRECT AND ‘NO’ IF THE STATEMENT IS INCORRECT.  
 IF ‘NO’ THE SELLER MUST PROVIDE DETAILS OR ATTACH RELEVANT DOCUMENTS TO THIS STATEMENT.**

1. TITLE	
	There are no interests in the land other than those recorded on the copy of the title attached.
Lot in a community titles scheme	If yes, copy of community titles certificate attached

2. BUILDINGS ON THE LAND	
<b>The seller is not required to disclose structural defects in the building or whether all building approvals have been obtained.</b>	
	Electricity water and sewerage are connected to the land.
	A compliant smoke alarm has been installed in the residence on the lot.
	An approved safety switch has been installed in the residence on the lot.
	A Pool Safety certificate has been issued in relation to the swimming pool on the lot. <sup>121</sup>
	A certificate of classification exists for the building (this does not apply to a dwelling house).
	No building work has been carried out on the lot by a person who is unlicensed within the last six years.

3. LAND USE RESTRICTIONS	
<b>The seller is not required to disclose limits on the use of the land or flooding history for the land.</b>	
	The lot is not recorded in the environment or contaminated land register or subject to any other order or notice under the <i>Environmental Protection Act 1994</i> (Qld).
	The lot is not on the Queensland Heritage Register or a Local Government Heritage Register.
	The lot is not affected by a Vegetation Protection Order.
	The land is not within a property map of assessable vegetation (PMAV).
	There is no undischarged coastal protection or tidal works notice for the land.
	There is no proposal to alter a public road, rail or port which may require a resumption of part of the lot.

4. COURT PROCEEDINGS	
	There are no current or threatened legal claims that may lead to a court order affecting the lot.
	There is no enforcement warrant issued by a court for the sale of the lot.
	There is no application in relation to trees situated on the lot and no order has been issued in relation to a tree situated on the lot.

5. GOVERNMENT NOTICES
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<sup>121</sup> If no Pool Safety Certificate a Form 36 *Building Regulations 2006* must be attached to this statement.

NOT GOVERNMENT POLICY

	There is no unsatisfied notice or order requiring work to be done or money spent in relation to the lot.
	There is no current show cause or enforcement notice issued by a local government or state authority.
	There is no current notice of intention to resume any part of the lot.

<b>6. MINING</b>	
	There is no resource authority (mining, petroleum, gas) for the land granted to a third party
	There is no land access agreement or conduct and compensation agreement in favour of another person related to a resource authority.

The seller warrants the accuracy of the information contained in this statement.

**Signature of seller**

**Date:**

## Attachment E – Body Corporate Certificate

NAME OF SCHEME	
Name of scheme to which the lot relates:	
Registered address of body corporate for service	
Name of person responsible for keeping body corporate records?	<b>Secretary, Body Corporate Manager or Other</b>
	Name:
	Address:
	Phone:

PART A: MONEY PAYABLE TO BODY CORPORATE BY LOT OWNER		
<b>Total Budget yearly:</b>		
<ul style="list-style-type: none"> <li>• Administrative Fund Budget:</li> </ul>	Total Budget* \$	What you will pay per year \$
<ul style="list-style-type: none"> <li>• Sinking Fund Budget:</li> </ul>	Total Budget* \$	What you will pay per year \$
	<p><b>*Note:</b> These amounts are for the body corporate's current financial year only from [ ] until [ ]. The amounts may change for each financial year.</p>	
<b>Other amounts payable to the body corporate by the lot owner:</b>		
<ul style="list-style-type: none"> <li>• Service agreements:</li> </ul>	\$	
<ul style="list-style-type: none"> <li>• Exclusive use by-law:</li> </ul>	\$	
<ul style="list-style-type: none"> <li>• Electricity agreements and gas:</li> </ul>	\$	
<ul style="list-style-type: none"> <li>• Other:</li> </ul>	\$	
Is there a current special levy for this year?	\$	Issued on:
	Installment/s due date:	
<b>Outstanding body corporate debts currently owed by the owner of the lot:</b>		
<ul style="list-style-type: none"> <li>• Levies</li> </ul>		
<ul style="list-style-type: none"> <li>• Penalties</li> </ul>		
<ul style="list-style-type: none"> <li>• Other amounts (for example recovery costs)</li> </ul>		

PART B: COMMON PROPERTY			
Is the lot owner responsible for maintaining improvements on the common property? For example, awnings, air-conditioners, BBQs and solar panels.	No	Yes	<i>Details of improvements lot owner is responsible for:</i>
Does the lot have the benefit of an exclusive use area?	No	Yes	<i>Details of the exclusive use:</i>
Is there a current notice of intention to resume any part of the common property issued to the body corporate?	No	Yes	<i>Details of notice:</i>
Has the body corporate granted a lease, easement or other right affecting the common property which was approved in the last 3 months but has not yet been registered?	No	Yes	<i>Details of lease, easement or other right:</i>

**PART C: BODY CORPORATE INSURANCE**

<b>Are there any policies of insurance held by the body corporate?</b>	No	Yes	<b>Details of insurance:</b>			<b>Amount of cover:</b>	
			• Property & building	No	Yes	\$	
			• Public liability	No	Yes	\$	
			If the scheme is a specified two-lot scheme, premium payable by owner of the lot:	\$			
			If a policy is for a voluntary insurance scheme, premium payable by the owner of the lot:	\$			
			Period of cover:				
<b>Do the body corporate's records contain any current or outstanding claims made under an insurance policy held by the body corporate?</b>	No	Yes	<i>Details of any claims:</i>				

**PART D: BODY CORPORATE INFORMATION**

<b>Is the Body Corporate currently involved in any dispute resolution proceedings?</b>	No	Yes	<i>Details of proceedings:</i>			
<b>If the scheme is a specified two-lot scheme, is there a body corporate account with a financial institution?</b>	No	Yes	If yes:			
			Amount in the account:	\$		
			Authorised party:			
<b>Is there a certificate of classification in the body corporate's records?</b>	No	Yes	<i>Copy attached.</i>			

**PART E: ASSETS**

<b>Is the scheme a specified two-lot scheme?</b>	No	Yes	Attach Register
<b>Is there an assets register for the body corporate?</b>	No	Yes	Attach Register
<b>Has the body corporate granted a lease, easement or other right affecting a body corporate asset which was approved in the last 3 months but has not yet been registered?</b>	No	Yes	Details of lease, easement or other right:

**PART F: BY-LAWS**

A copy of the by-laws currently in effect for the Scheme is attached.

The by-laws in effect for the Scheme are binding on all owners and occupiers at the Scheme. The body corporate is required to enforce the by-laws. Any breach of the by-laws may potentially result in proceedings being commenced and penalties being imposed on the person responsible for the breach.

**BODY CORPORATE AUTHORITY**

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

**Name:**

**Office held:**

**Signature:**

**Date:**