

TASMANIA
LAW REFORM
INSTITUTE

Vendor Disclosure

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How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. Questions are contained at the end of the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by **12 July 2004**.

If possible, responses should be sent by email to: **law.reform@utas.edu.au**

Alternately, responses may be sent to the Institute by mail or fax:

address: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS 7001

fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Jenny Rudolf, on the above contacts, or by telephoning (03) 62262069.

This issues paper is also available on the Institute's web page at: www.law.utas.edu.au/reform
or can be sent to you by mail or email.

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Mr Paul Turner (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

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Introduction and Background

Vendor disclosure refers to the practice of the vendor (seller) of property disclosing information about the property to the purchaser, or potential purchaser. This may be done by making a disclosure statement, giving certain undertakings (for example in the contract of sale) and/or providing certain documents.

Buying and selling property is a significant transaction. For many people, buying a home is the largest financial investment they will ever make. Apart from the financial size of the investment, the amount of emotional investment people make when buying a home is also high. The financial and emotional significance of this purchase means that purchasers want to get it right – they want to choose a property that suits their needs and desires and they want to pay no more than a fair price for that property. Assessing these factors requires *information*. Prospective purchasers can gather a lot of information by inspecting a property. But not all important information about a property can be learnt from the usual physical inspection undertaken by the purchaser, or even by a more detailed building inspection or pest inspection. The legal status of the land and buildings on it cannot usually be determined by the usual property inspection. Similarly, there may be hidden problems with the land or buildings, such as that it is prone to flooding, or has rising damp. Discovering these things may require making enquiries of various bodies such as the Land Titles Office, the local council or neighbours. Making these enquires can be costly and time consuming. It is the general impression that most prospective purchasers in Tasmania do not make these type of enquires before deciding to buy property. Rather, perhaps under marketplace pressure or simply the excitement of finding a property which appears to suit their needs and budget, they often sign a contract before obtaining any legal advice, perhaps often being unaware of the potential importance of any hidden information. This means that when most properties are bought and sold in Tasmania there is a significant information asymmetry: the seller knows much more about the property than the buyer. This clearly has the potential to put the buyer at a significant disadvantage, both in deciding whether to buy the property and in negotiating a fair price.

Traditionally, the common law has imposed little duty on sellers to redress this information asymmetry, instead imposing the principle of ‘buyer beware’. However, in recent years a number of Australian jurisdictions (NSW, Vic, SA and the ACT) have enacted legislation affording more protection to buyers by requiring vendors to disclose certain information about their property. In other Australian jurisdictions (WA, QLD, and the NT) the standard form contract used in property sales has been developed to encourage vendor disclosure.

A draft proposal was made in 2000 for the introduction of vendor disclosure legislation in Tasmania.¹ In November 2001, a Justice Department draft report reviewing the *Auctioneers and Real Estate Agents Act 1991*,² further considered the introduction of vendor disclosure and cooling off periods, stating: ‘Ultimately, both vendor statements and or a cooling-off period may bolster consumer protection and reduce the risk of reducing regulatory intervention such as licensing.’³

In 2003, aware of these earlier proposals that appeared to have stagnated, the Law Reform Institute’s Property Law Reform Group proposed that the Institute undertake a law reform project on vendor disclosure. Work on an issues paper was begun. Subsequently, in January 2004, the Attorney announced a proposal to introduce an Auctioneers and Real Estate Agents Bill to replace the *Auctioneers and Real Estate Agents Act*,⁴ in which it is planned to introduce consumer protection measures such as cooling-off periods, and outlawing ‘dummy bidding’. The issue of vendor disclosure is not being included in the Bill. However the Office of Consumer Affairs and Fair Trading (OCAFT) is currently preparing a proposal for Cabinet approval for OCAFT to prepare drafting instructions for a separate Bill, introducing vendor disclosure.

Part 1 of this issues paper outlines the current Tasmanian law relating to vendor disclosure, which is essentially the traditional common law position of buyer beware. Part 2 of this paper looks at the need to

¹ S Hayes, *Vendor statements and a cooling off period for real estate sales: A draft proposal*, 2000, Office of Consumer Affairs and Fair Trading.

² Review of the *Auctioneers and Real Estate Agents Act 1991*, November 2001, Department of Justice, Tasmania.

³ At 26.

⁴ Media release, Attorney-General’s Office, 30/1/2004.

reform the law, giving the reasons why the Institute favours the introduction of legislation requiring vendor disclosure in Tasmania. Part 3 looks at the options for reform, discussing the approaches of such legislation in other Australian jurisdictions. Finally, in Part 4, the paper proposes the form and content that vendor disclosure should take. It is particularly in relation to this proposal that the Institute seeks responses. There are questions at the end of Part 4 which can be used as a guide in responding to this paper.

Part 1

The Current Law

Vendor disclosure in Tasmania is governed by three areas of law: the common law, consumer protection laws and the standard form contract. This Part considers the operation of these three areas of law, and exactly what disclosure obligations they impose on a vendor of residential real estate in Tasmania.⁵

The common law

The starting point for any examination of the common law relating to vendor disclosure is the principle of caveat emptor –

Caveat emptor, qui ignorare non debuit quod jus alienum emit –

Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.

The principle of caveat emptor is premised on the ability of the purchaser to discover by inspection any defects in the property being purchased. In accordance with this principle, at common law, a purchaser has the right to rescind a contract for the sale of property only if –

- the vendor has failed to disclose defects with the title of the property; and
- those defects are not discoverable by a normal inspection of the property.

Clearly the meaning of ‘defect in title’ is crucial. In 1997, Young CJ (NSW) described the concept as follows:⁶

A very fine, but real, distinction exists between defects in title which entitle a person to [terminate] and defects in quality which do not. What is a defect in title is difficult to define, but usually encompasses the situation where the vendor is unable to convey the full estate which it promised to convey to the purchaser. A defect in quality merely means that the purchaser obtains the appropriate title to the land but that there are some facts relating to the quality of the property sold which affects its value.

Butt, a leading commentator in the area, says that examples of defects in title would be easements, covenants or leases. He goes on to say, rather unhelpfully, that ‘a defect in title may be one of those things that you can’t readily define – but you know one when you see one’.⁷

⁵ Some of the material in this Part is taken from L Griggs ‘Duty of disclosure by vendors in a conveyance – if caveat vendor, are we allowing the camel’s nose of unrestrained irrationality admission to the tent’, (1999) 7 *APLJ* 76-90.

⁶ *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189 at 15,193; quoted in P Butt, ‘Conveyancing and property law’ (2004) 78 ALJ 162, at 164.

⁷ P Butt, ‘Conveyancing and property law’ (2004) 78 *Australian Law Journal* 162, at 164.

The inherent difficulty in determining what constitutes a *defect in title* that would allow rescission, as against something that only goes to a *defect in the quality of the title* (and therefore does not permit the purchaser to rescind the contract) is demonstrated by the case of *Carpenter & Anor. v McGrath & Anor.*⁸ The McGraths were the registered proprietors of land at Mangrove Mountain in New South Wales, which they sold by contract dated 11 April 1989 to the Carpenters. The property sold was described as house, stables, sheds and land. In 1983, the McGraths had obtained development consent for the erection of a shed. A year later, this shed was constructed. However, a condition of the consent was that no building work was to be carried out until a formal building application was made and this had never been done. Accordingly, there was a legal risk that the local council could order the demolition of the shed. The issue before the court was whether the failure to obtain building approval for the erection of the shed constituted a defect in title, such as to allow the purchaser to rescind. It was held that the mere possibility that the land may be subject to some order pursuant to local government or some other statute was not a sufficient ground to hold that there was a defect in title.⁹ As there was no defect in title, the vendor had no duty to disclose the information and the purchaser had no right to rescind the contract.

As stated above, the ease with which a defect in title can be discovered will also affect the remedies available. Traditionally the courts will only grant rescission where the defect in title is 'latent'. A latent defect in title is a defect in title not discoverable upon a reasonable inspection of the property by the purchaser exercising ordinary care – the defect is concealed. This is contrasted to a 'patent' defect, which is obvious, unconcealed, and consequently need not be disclosed.¹⁰ However, should the purchaser have knowledge of the latent defect, the vendor is not longer obliged to disclose it.¹¹

Some examples of what the courts have held to amount to a defect in title are:

- the lack of appropriate consent to use the building by the local council;¹²
- the walls of the house being outside the boundaries of the land;¹³
- the failure of building work to comply with plans and specifications;¹⁴
- the existence of a storm-water drain;¹⁵
- easements for water or sewerage supplies not discoverable on inspecting the surface,¹⁶ such as an underground culvert for water running across the land;¹⁷
- restrictive covenants,¹⁸ such as an undisclosed public or private right of way;¹⁹ and
- the existence of sewer mains, or other pipes, connections or structures of supply authorities or services.²⁰

By contrast, courts have held the following to be defects as to quality rather than title:

- the possibility of a notice to repair or demolish being issued;²¹
- an alleged contravention of building regulations;²² and

⁸ [1996] 40 NSWLR 39

⁹ "At [the time of contracting] the property may have the potentiality to be subjected to orders or charges pursuant to a number of local government, rating and other statutes, which potentially may or may not in the future be realised. The passing of risk at the date of contract passes the risk of that potentiality. Thus, as it seems to me, it is correct in concept to hold that mere potentiality of affectation does not constitute a defect in title." [1996] 40 NSWLR 39 at p. 69. For further discussion of what constitutes a defect in title, see D. Skapinker, "A Different Perspective on Defects in Title and Quality", (1994) *APLJ Lexis* 27.

¹⁰ *Yandle v Sutton* [1922] 2 Ch 199.

¹¹ *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 118-119 per Jenkins LJ.

¹² *Vukelic v Sadil-Quinlan & Associates Pty Ltd* (1976) 26 FLR 457.

¹³ *Horning v Pink* (1913) 13 SR (NSW) 529, contrast *Dickie v O'Callaghan* (1886) 12 VLR 756.

¹⁴ *Long v Worona Pty Ltd* (1973) 1 BPR 9109 (purchaser not entitled to rescind because of special conditions in contract).

¹⁵ *Torr v Harpur* (1940) 40 SR (NSW) 585.

¹⁶ *Micos v Diamond* (1970) 72 SR (NSW) 392.

¹⁷ *Re Puckett and Smith's Contract* (1902) 2 Ch 258.

¹⁸ *Re Roe and Eddy's Contract* [1933] VLR 427.

¹⁹ *Yandle v Sutton* (1922) 2 Ch 199.

²⁰ *Micos v Diamond* (1970) 92 WN (SNW) 513.

²¹ *Barber v Keech* (1987) 64 LGRA 116; *Carpenter & Anor. v McGrath* [1996] 40 NSWLR 39; noted in P. Butt 70 *ALJ* 951; followed in *Sullivan v Dan* [1997] NSW ConvR 56,314.

²² *McInnes v Edwards* [1986] VR 161.

- the particulars of title disclosing an obligation to grant an easement.²³

History and development of caveat emptor

The doctrine of caveat emptor largely developed in a time when the economy was agrarian based. However, it can be even be traced to early Jewish and Roman law.²⁴ As stated by Pomeranz:

The doctrine of caveat emptor as it applies to real estate originated in England during the Middle Ages, a time when agriculture was the sole purpose of land. The doctrine was premised on the purchasers' ability to discover and protect himself from defects in the property through prior inspection, since the quality of the land took precedence over the quality of the structures of the land. Furthermore, it was assumed that the vendor and purchaser were of equal bargaining positions and engaged in arm's-length transactions, and that the buyer therefore did not need special protection.²⁵

English case law authority for the principle can be seen to emanate from the decision of *Chandelor v Lopus*.²⁶ In this case a goldsmith sold a jewel to another representing that it was a 'bezar' stone.²⁷ It was subsequently discovered that this was not the case. The purchaser sought relief. This was denied. The court held that the seller had not guaranteed the character of the stone, indeed the obligation was on the purchaser to ascertain the fairness of the transaction.²⁸ This principle was soon applied to land.²⁹ *Caveat emptor* was then to flourish given the pre-eminence of laissez-faire economic ideas during the change from the agricultural age to the industrial revolution of the 19th century. Atiyah notes:³⁰

If the responsibility for ensuring that a man acquired a reasonable purchase at a fair price were thrown upon the purchaser, they argued, then the purchaser would assuredly take the trouble to examine what he was buying with due care. Shoddy goods would disappear from the market, or if buyers in fact were willing to buy them at prices reflecting their poor quality, then the goods would find a market at that price and deservedly so. All this would follow from throwing the responsibility upon the purchaser, without any legislation or litigation.³¹

In essence, *caveat emptor* was permitted to grow because of the belief that government should adopt a non-interventionist policy in the regulation of private contracts. Society would prosper by allowing each individual to pursue her or his own economic gain.³² In the context of land transactions this principle of *caveat emptor* has not only led to the purchaser assuming the risk of defects in the quality of the land, but also the assumption of risk upon the entry into a contract for the purchase of land, the assumption of risk occurring even though the purchaser had not yet entered into possession. Risk was to be imposed on the purchaser from the date of signing, with little if any scope for public regulation at the hand of the government for matters considered to be private law.³³

²³ *Dougherty Bros Pty Ltd v Garde* (1976) 2 BPR 9206.

²⁴ See A Rogerson, 'Implied Warranty against Latent Defects in Roman and English Law' in D Daube (ed) *Studies in Roman Law of Sale*, 1959, 112 at 113.

²⁵ JB Pomeranz, 'The State of Caveat Emptor in Alaska as it Applies to Real Property', (1996) 13 *Alaska Law Review*, 237 at 238.

²⁶ 79 Eng Rep. 3; Cro. Jac. 4 (Ex. Ch. 1603).

²⁷ The bezar or bezoar stone was found in the stomach or intestines of animals and was once considered an antidote to poison.

²⁸ See the comments of the Court at 79 Eng. Rep. 3 at 4.

²⁹ See WH Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 40 *Yale Law Journal* 1133 at 1165.

³⁰ PS Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979.

³¹ Atiyah, above n. 30 at 465.

³² See the comments by MR Cohen, 'The Basis of Contract', (1933) 46 *Harvard Law Review* 553 at 558.

³³ As stated by D Fitzgerald, 'The Risk Issue in Sale', (1995) 9 *Journal of Contract Law Lexis* 1 at 6: 'The law on risk crystallised out in its final form in the 19th century - a time 'when the courts were anxious to develop rules favourable to sellers in order to encourage business activity. Indeed, risk law was well settled to the prevailing ethos of economic expansion brought on by the industrial revolution. The basic presumption that property and risk pass at the time of contract generally assured sellers of payment, regardless of the hazards involved in delivery. The law on risk also accorded with the precepts of laissez-faire. This is because the risk issue was not dealt with substantively by the courts so as to potentially interfere with commerce; it was left alone to be determined by the intention of the parties as to passage of risk or property.' (citations deleted).

The weakening of caveat emptor in other jurisdictions

Modern times have seen both judicial and legislative challenge to the assumptions that underlie caveat emptor – particularly the premise of equality in bargaining power between the vendor and purchaser. While common law authority supporting caveat emptor appears strong in Australia, a number of jurisdictions (NSW, Vic, SA and the ACT) have introduced legislation requiring vendor disclosure, and so circumventing caveat emptor.

In other common law jurisdictions the courts have challenged the principle of caveat emptor. Pomeranz discusses this phenomena in relation to England and America –

[A]s society grew more complex, courts slowly abandoned the doctrine of caveat emptor, at least in the area of residential real estate. They increasingly imposed stricter disclosure requirements as well as implied warranties in the sale of housing. One reason for this shift is the dramatic change in home-buying practices that occurred after World War II. As the demand for residential real estate increased, builders began producing houses in mass quantities. This frequently left buyers unable to closely inspect the real estate for defects prior to purchase. In addition, the increasing complexity of houses made it more difficult for the buyer to detect hidden defects. As a result of these changes, the courts were increasingly pressured to abandon the doctrine of caveat emptor.³⁴

Pomeranz goes on to discuss numerous cases in which English and American courts have modified or refused to apply the doctrine of caveat emptor, beginning with the English case of *Miller v Cannon Hill Estates, Ltd*³⁵ in 1931, which has since been adopted by a number of American courts.³⁶ Pomeranz concludes that ‘the doctrine of caveat emptor as it applies to residential real estate has been greatly eroded in most [American] states.’³⁷

These developments in other jurisdictions could be have some influence on Tasmanian courts considering the application of caveat emptor, but the strength of this influence cannot be determined at this stage.

Consumer protection laws

Consumer protection legislation was introduced into Australia in the form of the *Trade Practices Act* and the state equivalent fair trading legislation with the effect, among other things, of imposing an obligation on vendors and agents to disclose matters where purchasers would have a reasonable expectation that the information would be passed.³⁸ Such provisions have obvious potential in relation to vendor disclosure. However, these Acts apply only to transactions which occur in ‘trade and commerce’. It has been held that the sale of private residential real estate is not a transaction in ‘trade and commerce, even when conducted via the agency of a real estate professional.’³⁹ Accordingly, consumer protection legislation has had little impact upon the disclosure obligations imposed on vendors of residential property.

Standard form contracts

In Queensland, Western Australia and the Northern Territory the standard form contract used for the sale of residential property has been developed to promote vendor disclosure. However, the standard form contract used in Tasmania provides little protection to purchasers, essentially reinforcing the principle of caveat

³⁴ Pomeranz, above n. 25 at p. 239-240 (citations deleted).

³⁵ *Miller v Cannon Hill Estates, Ltd* [1931] 2 KB 113.

³⁶ Pomeranz, above n. 25 at p. 239-242.

³⁷ Pomeranz, above n. 25 at p. 242.

³⁸ E Webb, ‘Has Caveat Emptor Become Vendor, Lessor and Agent Emptor – Silence, s52 of the *Trade Practices Act 1974* (C’th) and Real Property Transactions’, (1995) *APLJ Lexis* 21.

³⁹ *O’Brien v Smolgonov* (1983) 53 ALR 107 at 114; ATPR 40-418 at 44,855; *Argy v Blunts* (1990) ATPR 41-015; *Franich v Swannell* (1993) 10 WAR 459.

emptor by only addressing matters which would amount to a defect in title (for example clause 5 states that the property is sold with all registered and apparent easements). The Tasmanian standard form contract does not address matters which would affect the quality of the title or value of the property (for example whether there is planning approval for all structures on the land, or existing proposals by local council affecting the use of the land).

Summary

The current law in Tasmania requires vendors of residential property to disclose little information to purchasers about the property. The common law principle of caveat emptor has the effect of requiring only that matters constituting a defect in title be disclosed – matters affecting the quality of the title need not be disclosed. Case law demonstrates that the distinction between these two categories is not always obvious. Similarly, general consumer protection legislation existing in Tasmania requires little information to be disclosed to purchasers. Likewise, the guarantees provided by vendors in the standard form contract used for most property sales in Tasmania do not significantly depart from the disclosure requirements at common law.

Part 2

The Need for Reform

Under the current law in Tasmania (as set out in Part 1), a vendor of property is not required to disclose to a purchaser potentially significant pieces of information, such as:

- Proposals by local and statutory authorities to resume the land or to acquire an easement or some other proprietary interest in the land.
- Planning restrictions (eg restrictions on use imposed by planning laws or council planning schemes) and environmental hazards (such as contamination) burdening the property.
- Illegal structures and breaches of building regulations that give rise to a council right to procure the issue of a demolition order.⁴⁰ A defect in title, and thus obligation on the part of the vendor to disclose, only arises where the council has decreed an order or given notice of demolition.⁴¹ The existence of illegal structures (such as sheds, decking, carports) is an area of significant practical concern in Tasmania. The vendor is unlikely to disclose such matters and so the purchaser takes the risk of council demolition at the time of contract. Moreover, a solicitor acting for a purchaser is unlikely to seek a certificate of completion or certificate of compliance for building works on a property for there is a danger that in doing so the council will be alerted to defects, leading to the possibility of a demolition order. Therefore as the law presently stands, the vendor has no interest, indeed a positive disincentive, to disclose any illegally constructed structures on the property.
- Similarly, if the vendor is aware of defects in the quality of improvements to the property or any structure on the property materially affecting its value, he or she need not disclose this to the purchaser.⁴²

⁴⁰ *Carpenter v McGrath* (1996) 40 NSWLR 39.

⁴¹ *Fletcher v Manton* (1940) 64 CLR 37.

⁴² *McInness v Edwards* [1986] VR 161.

It is the Institute's view that vendor disclosure of this type of information is desirable for the following reasons:

- The current conveyancing practice in Tasmania is that the purchaser signs a valid contract before obtaining legal advice, and often without this type of potentially important information about the property. Greater disclosure would therefore provide much needed assistance to purchasers in making their decision (both the decision to purchase and the decision about what terms to include in the contract) and in negotiating a fair price for the property. This is particularly so in a 'sellers market'.⁴³ The absence of cooling-off periods in Tasmania heightens this need. Proposals are currently being prepared by the Government to introduce cooling-off periods in Tasmania.⁴⁴ If cooling-off periods are introduced, then it is in the interests of vendors that purchasers enter contracts as fully informed as possible about the property, so that purchasers are not frequently using the cooling-off period as a chance to find out about the property and possibly withdraw from the contract of sale.
- The complexity of modern residential real estate makes it desirable for information to be directly supplied to the purchaser. It is much easier for the vendor to obtain and supply this information than for each potential purchaser to do so.
- Full and complete information on a property allows the market to operate at its optimal efficiency; the imprecision of the common law relating to vendor disclosure has the potential to promote litigation.
- Requiring vendor disclosure may encourage home owners to obtain council approval for building and renovation works.
- Requiring vendor disclosure would bring Tasmania into line with the law in the other jurisdictions⁴⁵ and reflect the trend of the law towards greater consumer protection.⁴⁶

Part 3

Options for Reform

It is the Law Reform Institute's view that vendor disclosure should be introduced in Tasmania. This should be done by the introduction of legislation requiring vendor disclosure.

Consideration was given to the option of introducing vendor disclosure by re-drafting the standard form contract. However, this option was rejected because vendors could very easily not use the standard form contract if they did not wish to disclose certain information, thus possibly leaving vulnerable the purchasers who are most in need of the assistance of vendor disclosure.

Legislation requiring vendor disclosure has been introduced in New South Wales, Victoria, South Australia, and most recently, the Australian Capital Territory. This legislation, in the context of imposing greater obligations to disclose on a vendor, has a number of aims:

⁴³ i.e. where demand for property is greater than availability.

⁴⁴ Media release, Attorney-General's office, 31/1/04.

⁴⁵ New South Wales, Victoria, South Australia, and most recently, the Australian Capital Territory, have introduced legislative measures requiring vendors to disclose certain information when selling residential property. In Queensland, Western Australia and the Northern Territory the standard form contract used for the sale of residential property has been developed to promote vendor disclosure.

⁴⁶ For example the introduction of the *Trade Practices Act 1974* (C'th) and the fair trading legislation.

- To ensure that purchasers possess more information about the property prior to purchase in order to reduce the imbalance in bargaining power between the parties;
- To ensure (given the complexity of modern residential realty, and the innumerable Federal, State and Local government restrictions that may attach to a title) disclosure of matters that may impact on the decision to purchase residential property, so that purchasers can make informed decisions;
- To recognise that the magnitude of the obligations associated with home ownership ‘may not be fully realised until subsequent reflection free from the blandishments of the real estate agent’;⁴⁷ and
- To recognise that, in many instances, the vendor is in a better position to provide information about the property than the purchaser is to discover it.

The legislative frameworks operating in these states can inform the consideration of the appropriate form and detail which vendor disclosure legislation should have in Tasmania.

New South Wales

Broadly speaking there are two requirements of vendor disclosure under the NSW legislative regime:

First, certain documents must be annexed to the contract of sale, before the purchaser signs it:⁴⁸

- a certificate disclosing the planning status of the land, issued pursuant to s 149 of the *Environmental Planning and Assessment Act 1979*;
- a copy of the folio of the register comprising the title;
- a copy of any registered plan;
- a sewerage diagram;
- copies of all deeds, dealings and other instruments lodged or registered in the Land Titles Office relating to: easements, profits a prendre, restrictions on the use of the land and positive covenants that affect the land; and
- additional documents that must be disclosed for Crown land and strata lots.

Failure to annex the prescribed documents does not render the contract void. Rather, the purchaser can rescind within 14 days of entry into the contract, unless the contract has been completed.⁴⁹ This remedy is available regardless of whether the purchaser can show that the failure amounted to conduct that misled or deceived them.⁵⁰

Secondly, the vendor is deemed to make a prescribed warranty to the effect that:⁵¹

- except as disclosed in the contract, the land is not subject to an ‘adverse affectation’;⁵²
- the land doesn’t contain a sewer vested in a public sewerage authority;
- the planning certificate annexed to the contract specifies the true planning status of the land;⁵³ and

⁴⁷ AJ Bradbrook, SV MacCallum and AP Moore, *Australian Real Property Law*, (2nd ed., LawBook Co., Sydney, 1997) at [5.69].

⁴⁸ *Conveyancing Act 1919* (NSW) s 52A(2)(a), the documents are prescribed by the *Conveyancing and Sale of Land Regulation 2000*, clause 5 and Schedule 1.

⁴⁹ *Conveyancing (Sale of Land) Regulation 2000*, clause 19(1)(a), 20(1)(a).

⁵⁰ *Gibson v Francis* (1989) 5 BPR 11,101 at 11,103.

⁵¹ *Conveyancing Act 1919* s 52A (2)(b), *Conveyancing and Sale of Land Regulation 2000* clause 7; schedule 3 Part 1.

⁵² This is defined by an exhaustive list (Part 3, Schedule 3 of the *Conveyancing and Sale of Land Regulation 2000*). Amongst other things it includes:

- proposals to acquire land;
- proposals to re-align, or widen or alter the level of a road or railway;
- orders under the *Local Government Act 1993* to demolish or repair;
- notices relating to pollution;
- notices in relation to boundary and fencing disputes and encroachments by or upon a structure on the property;
- rights of way under the *Mining Act 1912*; and
- licences under the *Water Act 1912*.

⁵³ Note the exception: the true planning status in relation to the matters contained in schedule 4, item 3 of the *Environmental Planning and Assessment Regulation 1994*.

- there is no matter in relation to any building or structure on the land that would justify the making of any upgrading or demolition order, or if there is such a matter, a building certificate has been issued.

If this warranty is breached the purchaser may rescind the contract at any time before completion⁵⁴ provided that the purchaser was unaware of the matter which ought to have been disclosed when the contract was made and the purchaser would not have entered into the contract if they had been aware of the matter.⁵⁵ The purchaser loses their right to rescission if they elect to affirm the contract.⁵⁶

Victoria

Vendor disclosure is required in Victoria by s 32 of the *Sale of Land Act 1962*. Under the Victorian legislative regime the vendor must disclose the following in a signed statement:⁵⁷

- for any land upon which a residence is erected, any information concerning building permits within the last 7 years given with respect to any building on the land;
- the particulars of any mortgage not to be discharged before the purchaser becomes entitled to possession or to rents and profits;
- particulars of any charge imposed under any Act;
- a description of any easement, covenant or similar restriction affecting the land;
- details of any planning instruments and the zoning of the land;
- a warning to the purchaser concerning permitted user; namely, where a planning instrument prohibits the construction of a dwelling on land outside the metropolitan area;
- details of any rates and taxes charged on the land;
- particulars of any notices, order declarations, reports or recommendations of a public authority or government department or an approved proposal affecting the land of which the vendor might reasonably be expected to have knowledge; this includes notices of intention to acquire;
- basic information about the following services: gas, electricity, water, sewerage and telephone; namely, whether the service is connected, and if so the name of the authority supplying the service. If a connected water or sewerage supply is below the standard level, particulars as to the level supplied. Furthermore, a warning must be supplied to the effect that the purchaser should check with appropriate authorities about the availability and cost of connecting any unconnected service;
- if there is no road access to the property, a statement to this effect;
- particulars of any current land use restriction notice that affects the land due to contamination;
- a copy of the certificate of title or other evidence of title to the land; if the vendor is not the registered proprietor or owner, evidence of their right or power to sell; and
- if the land is subject to a subdivision, certain information must be disclosed concerning the subdivision.

Where a vendor supplies false information or fails to supply all the information required the purchaser may rescind a contract entered into on the basis of that information⁵⁸ at any point before completion or becoming entitled to possession or rents and profits.⁵⁹ However, the purchaser may not rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if the relevant disclosure had been made.⁶⁰ The burden of proof lies with the vendor.⁶¹

⁵⁴ *Sale of Land Regulation* clause 20(1)(b).

⁵⁵ *Sale of Land Regulation* clause 19(3).

⁵⁶ *Zucker v Straightlance Pty Ltd* (1987) 11 NSWLR 87.

⁵⁷ *Sale of Land Act 1962*, s 32(2).

⁵⁸ Reliance or inducement need not be shown: *Fifty-Eighth Highwire Pty Ltd v Cohen* (Victorian Court of Appeal, Brooking, Charles and Callaway JJA, 7 February 1996, unreported).

⁵⁹ *Sale of Land Act 1962* (Vic) s 32(5).

⁶⁰ *Sale of Land Act 1962* (Vic) s 32(7).

⁶¹ *Urban No1 Co-Operative Society v Kilavus* [1993] VR 201 at 205, 210.

Australian Capital Territory

In the ACT the newly introduced *Civil Law (Sale of Residential Property) Act 2003* will come into effect on 1 July 2004. This legislation seeks to balance the rights of the seller and buyer. The legislation introduces comprehensive reforms to counter gazumping,⁶² a five-day cooling-off period and compulsory vendor disclosure. The vendor disclosure is by way of the vendor making the following documents available to all prospective purchasers throughout the time that an offer can be made:⁶³

- a copy of the Crown Lease;
- a copy of the current edition of the certificate of title;
- a copy of any encumbrance that is shown on the certificate of title (for example, a restrictive covenant or an easement);
- a statement about any encumbrance that does not appear on the title;
- a copy of the lease conveyancing inquiry documents for the property;
- for a unit, a copy of the units plan, and the current edition of the certificate of title for the common property;
- the building conveyancing inquiry documents;
- the energy efficiency rating statement;
- a building inspection report from an inspection carried out not earlier than 3 months before the day the property was first advertised for sale or listed by an agent; and
- a pest inspection report.

It is an offence if a seller does not make the required documents available for inspection by a prospective buyer.⁶⁴

The following conditions must also be included in all contracts for the sale of residential property:⁶⁵

- the property is sold free of encumbrances;
- the buyer is entitled to vacant possession;
- that there are no unapproved structures, except as disclosed in the contract;
- that the buyer may not make any requisitions on the title to the property;
- that there are no unsatisfied judgements, orders or writs affecting the property; and
- that the required documents form part of the contract.

On completion of a contract for the sale of residential property, the seller is entitled to reimbursement from the buyer for the cost of obtaining a building inspection report and a pest inspection report.⁶⁶

If the buyer becomes aware of an error in the description of the property before completion of the contract the buyer may –⁶⁷

- i) if the error is material, rescind the contract, or complete the contract and claim damages; and
- ii) if the error is not material – complete the contract and claim damages.

South Australia

The *Land and Business (Sale and Conveyancing) Act 1994* (SA) provides that at least 10 days before settlement the vendor must serve on the purchaser a statement in the form prescribed by regulation⁶⁸ setting out.⁶⁹

⁶² Gazumping occurs when a seller breaks their promise to sell a property to a buyer after having orally accepted the buyer's offer. See the comments of Mr Stanhope, (Chief Minister, Attorney-General, Minister for Community Affairs and Minister for the Environment, (2003) Week 7 *Hansard*, 26 June, 2003 p.2529).

⁶³ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 9.

⁶⁴ The offence is one of strict liability, punishable by a maximum of 10 penalty units: *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 10.

⁶⁵ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 11, see Appendix B.

⁶⁶ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 18.

⁶⁷ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 11(h).

⁶⁸ *Land and Business (Sale and Conveyancing) Regulations 1995* (SA), Schedule 1.

- the rights of the purchaser under s 5 (in relation to cooling off periods);
- details of all mortgages, charges and prescribed encumbrances affecting the land;
- if the vendor has obtained title within the last 12 months, all transactions involving transfer of title in that period; and
- any prescribed matters.

For the purposes of vendor disclosure, this last point is of the most operative effect, as the forms prescribed by the regulations are of a very detailed nature, essentially requiring the vendor to disclose any matter affecting, presently or prospectively, title to, or possession or enjoyment of the land.

Where a vendor makes a defective statement in relation to one of these matters that prejudices the purchaser, the purchaser may apply to the court for an order declaring the contract void and/or awarding damages or making any other order that is just in the circumstances.⁷⁰ Furthermore, failing to comply with these disclosure requirements constitutes an offence punishable by a fine of up to \$2,500.⁷¹ It is a defence in criminal or civil proceedings if:⁷²

- the alleged contravention was unintentional and did not result from negligence;
- the alleged contravention was due to reliance on information received from a person or body whom the vendor was required to obtain the information from under the regulations; or
- the purchaser waived compliance with the matter in question after obtaining legal advice on the issue.

The Act also specifically provides that it does not affect the existence of any other civil remedies.⁷³

An earlier proposal for vendor disclosure in Tasmania

In 2000 a Tasmanian report⁷⁴ prepared for the Office of Consumer Affairs and Fair Trading proposed that legislation requiring vendor disclosure be introduced to Tasmania:

The general proposal is that a vendor should make available to prospective purchasers, certain information, when they offer residential real estate for sale. Proposed legislation would create an offence [20 penalty units] for failure to provide this information. The legislation will prescribe a form containing the relevant questions.

...

The relevant information is to be presented as answers to questions in the prescribed vendor form. This information will comprise, on behalf of the vendor, a contractual commitment that the information is true and accurate. The legislation will provide that any loss arising from any inaccuracy of the information is recoverable by the purchaser from the vendor. Such a loss is to be recoverable within a period of three years from the date of any agreement for sale.

The vendor statement process is intended to exist along side and not to replace existing contracts for the sale of real estate.

A draft statement that was included in the report is reproduced in Appendix A of this paper.

⁶⁹ *Land and Business (Sale and Conveyancing) Act 1994 (SA)*, s 7.

⁷⁰ s 15.

⁷¹ s 14.

⁷² s 16.

⁷³ s 35.

⁷⁴ *Vendor statements and a cooling off period for real estate sales*, prepared by S Hayes for the Office of Consumer Affairs and Fair Trading, Department of Justice (Tas), August 2000.

Part 4

Proposal

The Institute recommends the introduction of vendor disclosure legislation. Such legislation should promote a fair balance between the rights and interests of vendors and purchasers by providing the purchaser with sufficient information to make a fully informed decision, while requiring vendors to provide only information that they know, ought to know, or could reasonably obtain.

The current conveyancing system and practices in Tasmania will obviously influence decisions made as to the form and content of vendor disclosure in Tasmania – just as such local matters have influenced the development of legislation in NSW, Victoria, the ACT and SA. For example, prior to the introduction of vendor disclosure in NSW, delays in conveyancing were a serious problem – this is not an issue in Tasmania. Similarly, the focus of the ACT legislation was to prevent ‘gazumping’, however, this is rarely a problem in Tasmania as the practice is for a binding contract to be signed almost immediately upon agreement.

Under current conveyancing practices in Tasmania purchasers do gather quite a lot of very useful information about the property from the purchaser’s requisitions and from the searches for information and requests for certificates they undertake. However, usually, most of this information is obtained *after* a binding contract has been signed. Thus it seems that in Tasmania the problem is not so much *what* information is obtained, but rather *when* it is obtained. Therefore, what is required is not to change the information that is supplied to the purchaser (or at least not significantly), but rather, to bring forward the *time* at which it is supplied. Thus, the system of vendor disclosure should aim to eliminate (in most cases) the need for the purchaser to make requisitions and conduct searches. To achieve this the Institute proposes that Tasmania adopt a system of disclosure based on the ACT legislation. The approach taken by the ACT is preferred for its relative simplicity, clarity and adaptability to Tasmanian conditions.

In summary, it is proposed that:

1. a seller of residential property must make ‘disclosure documents’ available for inspection by a prospective buyer (or their agent) at all times when an offer to buy the property may be made to the seller;
2. the ‘disclosure documents’ should be defined by the legislation to include the originals or copies of:
 - the proposed contract,
 - the certificate of title and the schedule of easements and covenants (where relevant),
 - specified certificates/documents, and
 - a ‘vendor statement’;
3. the legislation should set out ‘required conditions’, which must be included in the contract;
4. specified remedies should be available to the purchaser.

These matters will now be discussed in more detail. The Institute invites responses commenting on these details.

The form and timing of disclosure

- 1. a seller of residential property must make certain ‘disclosure documents’ available for inspection by a prospective buyer (or their agent) at all times when an offer to buy the property may be made to the seller;**

The aim of disclosure is to inform the purchaser of matters relevant to the decision to buy. It is therefore essential that disclosure occur *before* this decision is made. Disclosure should not occur at the exchange of contracts. The ‘disclosure documents’ should be available for potential purchasers to inspect from the date

that the property is on the market, and vendors (or their agents) should do what is reasonable to make potential purchasers aware that they can inspect the disclosure documents.⁷⁵

The Institute recognises that the preparation of the disclosure documents will cause a delay between the decision to place a property on the market and the property actually being placed on the market. It is recognised that this may cause inconvenience in some instances, perhaps particularly where one property is bought subject to the sale of another property. However, it is felt that this inconvenience is outweighed by the benefits of disclosure. In any event, most purchasers who buy a property subject to the sale of another property, may have already anticipated the need to prepare for the sale of their own property or will in fact already have placed their property on the market.

At this stage the legislation should only relate to residential property. The matters relevant to the decision to purchase commercial property and residential property are different. Furthermore, it is in the residential real estate market that purchasers are most in need of further protection and information – those in the business world are assumed to be more capable of protecting their interests. Vendor disclosure in relation to commercial property may be an appropriate matter for consideration at a later stage.

‘Residential property’ should mean:

property used or intended to be used as a place of residence but does not include property from which a business operates, or has operated, within the last 2 years.

The ‘disclosure documents’

2. the ‘disclosure documents’ should be defined by the legislation to include the originals or copies of:

- the proposed contract
- the certificate of title and the schedule of easements and covenants
- specified certificates/documents
- a ‘vendor statement’

the proposed contract

Inspection of the proposed contract informs the purchaser of the terms on which the seller wishes to sell. In many cases the standard form contract will be used, and inspection may reveal little, but at least will put the prospective purchaser on notice of the required conditions (see discussion below). In other cases, where the standard form contract is not used, or where special terms are inserted in the contract, it makes sense for prospective purchasers to be put on notice of the terms on which the vendor wishes to sell as clearly these may be very important in the purchaser’s decision to buy.

the certificate of title and the schedule of easements and covenants

A copy of the certificate of title (provided by the Land Titles Office) is obviously an important document that should be required for vendor disclosure. It gives the prospective purchaser:

- the title number as a volume/folio reference
- a description of the land
- the current owner’s name and tenancies held⁷⁶

⁷⁵ This could be required to be done either orally by the seller or their agent, and/or by notice in writing – for example on an agent’s advertising material or on the property flyer.

⁷⁶ only leases for a term exceeding 3 years may be registered: *Land Titles Act 1980*, s 64.

- any registered easements, mortgages, covenants, encumbrances, caveats, etc
- a list of any unregistered dealings⁷⁷
- a copy of the plan of title

Where relevant, a schedule of easements and covenants should also be required as the details of any easements and covenants would be important information for a prospective purchaser in deciding whether to buy the property and in negotiating a fair purchase price.

specified certificates/documents

Under current conveyancing practices in Tasmania, a number of searches for information relating to the property are carried out by the purchaser (or more usually their solicitor) between the signing of the contract of sale and the settlement date. Some of these searches are, in relation to some properties at least, of a rather precautionary nature, and so it would be unduly onerous for the certificates or documents that these searches produce to be required disclosure documents. Rather, such information can be covered in the 'vendor statement' (see discussion below). Certificates and documents which should be specified 'disclosure documents' are:

- Certificate of Council Rights in or Powers Over Land (provided by Local Councils pursuant to s 337 of the *Local Government Act 1993*). This certificate provides information relating to many things, including: nuisances, council notices that have been served in respect of the property, sewerage, water supply, planning scheme and zone, current planning permits, building completion certificates, landslips, demolition orders, and indemnity policies under the *Housing Indemnity Act 1992*.
- Certificate of Rates and Charges (provided by Local Councils pursuant to s 132 of the *Local Government Act 1993*) or equivalent (invoice for rates from council and receipts from council for payment)
- Statement of Estimate of Liability of Land Tax owing (issued pursuant to the *Land Tax Act 2000* by the Department of Treasury and Finance)

The approximate cost to the vendor in providing these documents would be \$76:

- Certificate of Council Rights in or Powers Over Land: available on application to Council, \$50
- Rates and charges certificate s 132: available on application to Council, \$15
- Statement of Estimate of Liability of Land Tax owing: available from Service Tasmania, \$11

a 'vendor statement'

The vendor statement should disclose information that the vendor *knows or reasonably ought to know* about the matters which are currently the subject of searches for information from statutory bodies by the purchaser and the purchaser's requisitions. The remedies available (see below) will mean that purchasers will be able to rely on the information given in the vendor statement, and so will no longer need to carry out many of these searches, nor make requisitions. Vendors may choose to verify some facts in the statement by attaching verifying documents. If a fact is particularly important to a particular purchaser, and it is not verified by documentation, that purchaser will of course still be able to verify or explore the matter further for themselves by carrying out the relevant searches or making purchaser's requisitions.

While some duplication of information is acceptable, in the interests of keeping the vendor statement clear and concise the statement should avoid addressing matters that are addressed by the other disclosure documents. The Director of Local Government is currently reviewing the form and content of s 337 certificates. If changes are implemented to s 337 certificates, this may also necessitate changes to the vendor statement. For this reason it seems preferable for the form and content of the vendor statement to be provided for by regulation rather than statute. Taking into consideration the matters that are currently covered by s 337 certificates, the following matters should be addressed in the vendor statement:

⁷⁷ i.e. a dealing of which the Land Titles Office has notice, but which has not yet been registered because, for example, it is subject to amendment or requisitions.

Zoning, planning and uses

Whether the land is currently being used for a use that is not permitted. It should also be stated whether any planning or building permit has been refused during the vendor's ownership or in the last 3 years, whichever is the shorter, and if so details should be provided. The statement does not need to address whether the property is subject to a planning scheme, or the zoning of the property under the planning scheme, or whether there is a current planning permit applying to the land, as these matters are all dealt with by the Certificate of Council Rights in or Powers Over Land.

Building works

Whether the owner is undertaking or has undertaken any building works on the property, or is aware of any building works undertaken on the property by a previous owner, for which all the legally required authorisations, consents, approvals and insurance policies⁷⁸ have not been, or were not, obtained.⁷⁹

Building condition

Whether there are any structural faults with any building on the property which are not easily discernable on inspection. Whether any building on the property suffers from other significant problems which are not easily discernable on inspection, such as: dampness related problems (such as rising damp, wet or dry rot, mould), leaks, recurring wall or ceiling cracks, or plumbing problems. It is felt that a building inspection report should not be required. Most purchasers in Tasmania do not pay for a building inspection report, therefore, it seems unreasonable for vendors to be required to do so.⁸⁰ However it does not seem unreasonable to expect a vendor to disclose serious problems that they are aware of.

Plumbing works etc

Whether the owner has undertaken any plumbing, draining, sewage or electrical works on the property which require authorisations, consents and/or approvals, and if so, whether all such authorisations, consents and/or approvals were obtained.

Pests

Whether any pest control services have been required to be carried out during the past 2 years (or as long as the vendor has owned the property, whichever is the shorter period), and if so details should be provided.

Unregistered easements, etc

Whether the property is affected by any unregistered easements, licences, covenants, leases, or rights or way, and if so details should be provided.

Historic Cultural Heritage Act 1995

Whether the property is registered (or provisionally registered) in the Heritage Register,⁸¹ and if so details should be provided.⁸²

National Estate/List

Whether the land or the premises is on the Register of the National Estate⁸³ or is on the National Heritage List or Commonwealth Heritage list,⁸⁴ and if so details should be provided.

Flooding

Whether the land is subject to periodic flooding or located in a flood prone area.

⁷⁸ for the purposes of the *Housing Indemnity Act 1992*.

⁷⁹ While many vendors may not know exactly what approvals etc are legally required, if they are unsure whether the required approvals etc have been obtained it is appropriate that they explore this matter further with the Council or a solicitor – just as they would currently do when answering similar questions in the requisitions.

⁸⁰ Of course many purchasers may still choose to buy property subject to a satisfactory building inspection report being received.

⁸¹ as kept by the Heritage Council under the *Historic Cultural Heritage Act 1995* s 15.

⁸² A person can apply for a certificate stating that the property is not entered in the Heritage register under s 79 of the *Historic Cultural Heritage Act 1995*. This information is important to prospective purchasers as entry on the Heritage Register affects the right to carry out works on the property: *Historic Cultural Heritage Act 1995*, Part 6.

⁸³ As maintained by the Australian Heritage Council under the *Australian Heritage Council Act 2003* (C'th).

⁸⁴ Both established by the *Environment Protection and Biodiversity Conservation Act 1999* (C'th).

Landslip

Whether the property is in a declared landslip area under the *Mineral Resources Development Act 1995*⁸⁵ or in a landslide zone.

Mining Rights

Whether there are any mining rights affecting the property.

Transend easements

Whether Transend Networks Pty Ltd have any easements on the property (to carry electricity).⁸⁶

Legal liability

Whether there are any unsatisfied judgments, orders or writs affecting the property; or any current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property.

Encroachments

Whether there is any fence or structure on the property encroaching onto neighbouring land, or whether there is any fence or structure encroaching onto the property from neighbouring land.

Water charges

Whether the property is subject to excess water charges or a user-pay water charge system.

Other notices

Whether the vendor has received any notices or orders from a Council or any other person, including a statutory or government body relating to forbidden human habitation; environment protection; environmental infringement; or any other notice or order that affects the land or use of the land.

Chattels, etc

Whether there are any defects, faults or problems with any chattels being sold with the property.

Strata or Community Lot

Whether there are any arrears in relation to the contributions payable in relation to the unit/lot, and if so details should be provided. And whether there is any expenditure that the strata/community corporation has incurred, or has resolved to incur, to which the unit holder/owner of the lot must contribute, and if so details should be provided.

Keeping the information current – 6 months

For purchasers to be able to rely on the disclosure documents they must be current. Therefore, when disclosure documents are available for inspection, the information they contain should have been obtained no more than six months previously. Furthermore, if a vendor becomes aware that the disclosure documents contain an inaccuracy (for example due to a change in circumstances), the documents must be amended as soon as possible, and the inaccuracy should be brought to the attention of any purchaser who inspected the inaccurate documents and makes an offer to buy the property.

⁸⁵ this information is currently given in the s 337 Certificate.

⁸⁶ this information is available by requesting a Wayleave Search of Transend Networks for a fee of \$22.40; such easements may also be registered on the certificate of title.

Exceptions

A vendor statement should not be required if the property is being sold –

- (a) by a mortgagee in possession of the property; or
- (b) by a registered or official trustee, or the official receiver, under the *Bankruptcy Act 1966* (Cth); or
- (c) under a court order.

Required conditions

3. the legislation should set out ‘required conditions’, which must be included in the contract

Purchasers should be protected by the inclusion of ‘required conditions’ in all contracts for the sale of residential property.⁸⁷ The following should be required conditions.⁸⁸

- (a) except as disclosed in the disclosure documents –
 - (i) the property is sold free of encumbrances other than the encumbrances shown on the certificate of title; and
 - (ii) the buyer is entitled to vacant possession;
- (b) if, before completion of the contract, the buyer becomes aware of a breach of a condition mentioned in paragraph (a), the buyer may –
 - (i) rescind the contract; or
 - (ii) complete the contract and claim damages;
- (c) except as disclosed in the disclosure documents, there are no unapproved structures⁸⁹ on the property;
- (d) if, before completion of the contract, the buyer becomes aware of any unapproved structure that is not disclosed in the disclosure documents, the buyer may rescind the contract;
- (e) the seller warrants that the seller will, at the time of completion, be able to complete the contract;
- (g) if, before the completion of the contract, the buyer becomes aware of an error in the disclosure documents, the buyer may –
 - (i) if the error is material – rescind the contract and claim damages, or complete the contract and claim damages; or
 - (ii) if the error is not material – complete the contract and claim damages;

Remedies

4. specified remedies should be available to the purchaser.

The required conditions specify remedies where there is an error in the disclosure documents.

It should also be provided that if the disclosure documents were not available for inspection by the buyer before the contract was signed or the vendor did not act reasonably to make the buyer aware that they could inspect the disclosure documents (and the buyer was not aware), the buyer may –

- (a) if the contract has not been completed, rescind the contract and claim damages or complete the contract and claim damages, or

⁸⁷ This approach is based on the ACT legislation. Similarly, the NSW legislation imposes implied warranties. The ACT approach is preferred because actually including the terms in the contract makes it more likely that purchasers will be aware of them, thus better fulfilling the aims of vendor disclosure.

⁸⁸ these are a modified version of the conditions required by the *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11, which is reproduced in Appendix A.

⁸⁹ the term ‘unapproved structure’ should be defined to mean a structure for which the legally required authorisations, consents and approvals have not been obtained.

- (b) if the contract has been completed, claim damages.

Furthermore, these remedies should be available where the contract does not include any of the required conditions. In addition, if the contract has not been completed, and the buyer does not wish to rescind the contract, the condition/s should be taken to be included in the contract.

The normal limitation periods should apply to any claim for damages.

Criminal offences

Non-compliance with disclosure requirements should not constitute a criminal offence. The provision of (or lack of) information relevant to the sale of private property is not an appropriate area for the criminal law to be involved. Where conduct is of a sufficiently serious nature, existing criminal offences (such as fraud or obtaining a financial advantage by deception) can be charged. This issue can be reconsidered at a later stage if it is felt that serious harm warranting the protection of the state is resulting from non-compliance, or if stronger methods of ensuring compliance appear warranted.

How will vendor disclosure operate in practice?

It is envisioned that in many instances real estate agents will assist vendors obtaining and preparing the disclosure documents. Real estate agents will not be able to charge for this service unless they are solicitors or registered conveyancers.⁹⁰ In some cases, for example where the vendor is worried about the answer to a question on the vendor statement or where the vendor does not wish to use the standard form contract, vendors may choose to use the services of a solicitor or conveyancer in obtaining and preparing the disclosure documents.

Purchasers (and their solicitor or conveyancer) will be able to inspect the disclosure documents before signing the contract. In many instances they will no longer need to carry out any further searches or make requisitions, although in some instances they may still wish to do so.

Solicitors and conveyancers will continue to service and advise sellers (in obtaining and preparing the disclosure documents) and buyers (in interpreting the disclosure documents) and performing the other tasks of conveyancing (such as advising on insurance, signing and exchanging contracts, preparing documents to convey title, making rates and land tax adjustments, arranging for payment of settlement funds, and so on). Furthermore, people will continue to be able to carry out their own conveyancing if they chose to do so (the conveyancing system will certainly be no more complex).

Questions

Please explain the reasons for your views as fully as possible.

1. The Institute is currently of the view that vendor disclosure legislation should be introduced in Tasmania. If you do not agree with this view, why not?
2. If legislation requiring vendor disclosure is introduced, would you support the general process of vendor disclosure proposed in this paper?

⁹⁰ It is currently an offence for any person to carry out conveyancing work for a fee: *Legal Profession Act 1993*, s 54(1)(f), however the Conveyancing Bill 2004, which is currently before Parliament, will allow licensed conveyancers to carry on business as a conveyancer for a fee or reward.

3. Do you agree that at this stage disclosure should be limited to residential properties? Do you think that the proposed definition of a residential property is appropriate?
4. Do you think that the proposed 'disclosure documents' are appropriate? Should any other documents be 'disclosure documents'?
5. Do you think that the matters proposed to be addressed in the 'vendor statement' are appropriate? Should any of the matters discussed not be included? Should more detailed information be required in relation to any matters? Should any additional matters be addressed by the statement?
6. Do you think that the 'required conditions' are appropriate?
7. Do you agree with the proposed available remedies?

Appendix A

Draft Vendor Disclosure Statement, Office of Consumer Affairs and Fair Trading, (Tasmania) 2000.

Local Government Issues:

1. In relation to this property have you received any notices or orders from the Council or any other person, including a statutory or government body relating to?
 - a) Nuisance abatement;
 - b) Fencing;
 - c) Rehabilitation or Non-Rehabilitation of Land;
 - d) Tree, Bush Roots;
 - e) Land Use;
 - f) Washing Facilities;
 - g) Plumbing Regulations;
 - h) Forbidden human habitation;
 - i) Environment Protection;
 - j) Environmental Infringement; and
 - k) Any other council notice or order that affects the land or use of the land?

Specific Issues that may be raised in other legislation

2. Is the land subject to periodic flooding or located in a flood prone area?
3. Is there a current planning permit applicable to the subject land?
4. Is the land or the premises listed as a significant item on the National Estate/Trust Register [or similar organization]?
5. Is the property connected to the sewerage system?
 - If no, has the Council approved a septic tank or other system?
 - If yes, specify the type of system approved as well as any conditions of approval and whether the owner is responsible for maintenance or repair of the system?
6. Since you purchased the property has there been any plumbing work performed which required a plumbing authorization? If yes, has the certificate of completion been issued?
7. Is the land within a declared landslip area under [the relevant legislation]?
8. Is the land subject to an order made [any legislation pertaining to major developments]?
9. Is the Council responsible for the maintenance and repair of the specified highway or road?
10. Is the Council entitled to make any part of the specified highway(s) construction at the owner's expense? If yes, please provide details.

Building Issues

11. In relation to his property, have you received any notices or orders from the Council or other statutory or government body concerning;
 - a) Building demolition or 'subject to prescribed conditions';
 - b) Illegal Works;
 - c) Uncover, open up work, demolition or inspection;

- d) Rectification, or notice to repair an unhealthy building;
- e) Any other council notice or order that affects any buildings or use of any building on the land? If yes, please provide details.

12. Has any building been erected or has any building work been performed on the land, for which building approval has been provided by the Council but for which a certificate of occupancy/completion has not been issued?

13. Is there any building on the land that has a housing indemnity policy in force? If yes, please provide details.

14. Since you purchased the property has there been any building work performed where a certificate of material compliance has been issued? If yes, have you received any council certificates with the endorsement "This building was not the subject of the normal application, permit and inspection procedures" [or such other endorsements as is appropriate for each jurisdiction]?

General

15. Are you aware of any defects, faults or problems with the [a list of chattels/structural features would be included]

Encroachments

16. Are all structures and improvements on the property wholly within the property boundaries? If no, please give details.

17. Are you aware of any structures or improvements on any adjoining properties that partially or wholly encroach on your property boundaries? If yes, please give details.

Private/Commercial Easements

18. Has any claim been made by a person to claim, obstruct or limit the rights of passage or way to and from the land? If yes, please give details.

19. Is the title to the land presently or prospectively affected by any rights by another person, other than the owner, the exercise of which interferes with the normal rights of the owner of the land? If yes, please give details.

Encumbrances

20. Are there any unregistered encumbrances on the land that would not be discharged on the sale of the land? If yes, please give details.

Strata or Community Lot

21. Are there any arrears in relation to the contributions payable in relation to the unit/lot? If yes, please give details.

22. Is there any expenditure that that strata/community corporation has incurred, or has resolved to incur, to which the unit holder/owner of the lot must contribute? If yes, please give details.

GST Information

23. Is the property a new residential premises for the purpose of the *A New Tax System (Goods and Services Tax) Act 1999*?

24. Is the property subject to a native title claim?

Appendix B

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

Section 11

- (1) (a) except as disclosed in the contract –
 - (i) the property is sold free of encumbrances other than the encumbrances shown on the certificate of title; and
 - (ii) the buyer is entitled to vacant possession;
- (b) if, before completion of the contract, the buyer becomes aware of a breach of a condition mentioned in paragraph (a), the buyer may –
 - (i) rescind the contract; or
 - (ii) complete the contract and claim damages;
- (c) except as disclosed in the contract, there are no unapproved structures;

- (d) if, before completion of the contract, the buyer becomes aware of any unapproved structure that is not disclosed in this contract, the buyer may rescind the contract;
 - (e) the buyer may not make any requisitions on the title to the property;
 - (f) the seller warrants that, at the date the contract is made –
 - (i) the seller will, at the time of completion, be able to complete the contract; and
 - (ii) the seller has no knowledge of any unsatisfied judgments, orders or writs affecting the property; and
 - (iii) there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property;
 - (g) the seller warrants that, at the date the contract is completed –
 - (i) the seller will be the registered proprietor of the lease (if any); and
 - (ii) there are no unsatisfied judgments, orders or writs affecting the property; and
 - (iii) there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property;
 - (h) if, before the completion of the contract, the buyer becomes aware of an error in the description of the property, the buyer may –
 - (i) if the error is material – rescind the contract, or complete the contract and claim damages; and
 - (ii) if the error is not material – complete the contract and claim damages;
 - (i) the disclosure documents mentioned in section 9 (1)(a) to (g) for the sale form part of the contract.
- (2) However, the conditions mentioned in subsections (f) (ii) and (iii) and (g) (ii) and (iii) are not required to be included in a contract if the property is being sold –
- (a) by a mortgagee in possession of the property; or
 - (b) by a registered or official trustee, or the official receiver, under the *Bankruptcy Act 1966 (Cth)*; or
 - (c) under a court order.
- (3) If a contract for the sale of residential property is entered into and the contract does not include a condition required under subsection (1) to be included in the contract, the condition is taken to be included in the contract.

Note that section 3 provides –

unapproved structure means a structure –

- (a) that is required to be approved under the *Building Act 1972* but has not been approved; or
- (b) the building of which is required to be approved under the *Land (Planning and Environment) Act 1991* but for which an unqualified certificate of occupancy has not been issued under the *Building Act 1972*.