

# EVALUATING INFORMATION DISCLOSURE TO BUYERS OF REAL ESTATE – USEFUL OR MERELY ADDING TO THE CONFUSION AND EXPENSE?

SHARON CHRISTENSEN<sup>\*</sup>  
W D DUNCAN<sup>†</sup>  
AMANDA STICKLEY<sup>‡</sup>

*This article questions the effectiveness of the current seller disclosure regimes in Australia and asks whether the statutory regimes have failed to achieve balance between the interests of buyers in being appropriately informed and the financial burden to the seller of extensive seller disclosure. This article suggests that it is time for governments to re-evaluate the balance between buyer and seller by giving greater consideration to not only what buyers actually want to know when buying a residential property but also the burden imposed on sellers of real estate. The article examines disclosure legislation in residential conveyancing throughout Australia, the form of the various obligations and their effectiveness as an instrument of raising buyer awareness of prospective defects in the land being purchased. It seeks to investigate whether compliance with the various provisions by a seller create more problems for a seller given the seller's reliance for disclosure information upon local authorities and other government agencies than benefits for a buyer by analysing the case law on the mandatory disclosure provisions, largely in New South Wales, Victoria and to a limited degree in Queensland. It concludes by urging some standardisation of the substance of mandatory disclosure and simplification of the provisions from an operational standpoint which might ultimately lessen both the cost of conveyancing to the consumer and the incidence of litigation between consumers as much as possible.*

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<sup>\*</sup> Gadens Professor of Property Law, Law Faculty, Queensland University Technology, Consultant, Gadens Lawyers, Brisbane.

<sup>†</sup> Professor, Faculty of Law, Queensland University of Technology, Consultant, Allens Arthur Robinson, Solicitors.

<sup>‡</sup> Senior Lecturer, Faculty of Law, Queensland University of Technology.

## I INTRODUCTION

Mandatory disclosure of information by sellers to buyers of residential real estate has been viewed by many as providing the modern panacea for the perceived information imbalance between sellers and buyers, which is largely attributed to the doctrine of *caveat emptor*. Most Australian States,<sup>1</sup> commencing with Victoria in 1982,<sup>2</sup> have introduced statutory regimes for seller disclosure in residential property transactions. Whilst agreement exists in relation to the cause of the information imbalance and the purported benefits to buyers, the legislative frameworks in which this has been achieved differs significantly between Australian jurisdictions. There is very little uniformity of approach and no apparent research to underpin a choice by any government between the different regimes for seller disclosure and whether one particular approach results in better informed consumers.

The review of current disclosure regimes indicates that in some jurisdictions the information pendulum has swung very much in favour of the buyer at the expense of the seller to such an extent, it could be said that the maxim *caveat emptor* has been consigned to history. One learned commentator, Lynden Griggs, has suggested that this indeed may be the case.<sup>3</sup> He tracks the deleterious influence of the relatively modern phenomenon of consumer law upon the principle *caveat emptor* in land transactions. He is sufficiently confident in his conclusions to recommend a comprehensive ‘vendor statement’ for the purchase of all residential real estate. The ‘vendor statement’ would mandate the release of information that Griggs considers would affect the decision of a potential buyer whether to proceed with a purchase or not.<sup>4</sup> It is clear that this recommended statement effectively ignores any legal distinctions between defects in title, defects in quality of title and other unclassified adverse effects upon the property.<sup>5</sup> Griggs predicts the eventual demise of any vestige of the principle *caveat emptor* in Australian land transactions and the adoption of extensive vendor statements in all jurisdictions.<sup>6</sup>

This article does not necessarily advocate this position nor does it adopt Griggs’ ideal seller statement. It does, however, question the effectiveness of the current disclosure regimes and asks whether the statutory regimes have failed to achieve balance between the interests of buyers in being appropriately informed and the financial burden to the seller of extensive seller disclosure. This article suggests that it is time for governments to re-evaluate the balance between buyer and seller by first examining several issues:

- (i) What information is relevant to a buyer’s decision to purchase a property?

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<sup>1</sup> There are no statutory requirements of disclosure in the Northern Territory and only limited disclosure in Queensland and Western Australia in relation to strata title units.

<sup>2</sup> Legislation was introduced in New South Wales (1985); Western Australia (1985 – strata title only); South Australia (1994); Queensland (1994 – strata title only); Australian Capital Territory (2003); and Tasmania (2005).

<sup>3</sup> ‘The Interrelationship of Consumer Values and Institutions to the Vendor’s Duty of Disclosure’ (2005) 11 *Australian Property Law Journal* 116.

<sup>4</sup> L Griggs, ‘A Draft Vendor Disclosure Statement-Consideration and Comparison’ (2001) 9 *Australian Property Law Journal* 1, 9.

<sup>5</sup> *Ibid* 10-11.

<sup>6</sup> *Ibid* 12.

- (ii) In what form should the information be provided so that a buyer will read and use the information in the purchase? Is a government certificate better than a seller statement?
- (iii) Should buyers be given limited rights after contract to obtain compensation for defects not disclosed by a seller?
- (iv) Should buyers be forced to verify the information provided by a seller in order to ensure the disclosure is accurate?

The answers to these questions should then inform the consideration of how to frame disclosure legislation so as to provide maximum disclosure to buyers while minimising the additional cost to sellers arising from the preparation and updating of statements and costs thrown away due to inaccurate seller statements or statutory certificates.

Before considering these issues the article examines the mischief behind the introduction of seller disclosure and what legislatures were endeavouring to achieve through the imposition of mandatory seller disclosure. This provides a background to compare some of the perceptions and realities of the effectiveness of seller disclosure in overcoming the mischief and better informing buyers.

## II THE ORIGINAL MISCHIEF – CAVEAT EMPTOR

The law has long required a balance between what a vendor must disclose and what a purchaser must search, for both to discharge their respective obligations in the sale process. Under the common law principle of *caveat emptor, qui ignorare non debuit quod jus alienum emi* ('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') there is a long recognised duty upon a buyer of land to be satisfied as to what he or she is to purchase.<sup>7</sup> By virtue of this principle, apart from certain exceptions,<sup>8</sup> a buyer upon settlement will be deemed to have acquired the property together with all defects either as to title or quality.

The doctrine evolved first in the context of sale of goods where it was considered that buyers were able to inspect and make their own judgement about the goods and the price they were willing to pay. The policy of the time considered it unnecessary for government to intervene within the market to protect buyers from their own bad decisions.<sup>9</sup> The principle was first applied to land in a predominantly agricultural period where the quality of property and defects were either known by buyers or easily detectable.<sup>10</sup> Under the original strict application of the *caveat emptor* doctrine, a seller was under no obligation to disclose to a buyer any known defects (either as to quality or title) which may have adversely affected the property – whether apparent or latent.

<sup>7</sup> For a discussion of the origins of caveat emptor see AM Weinberger, 'Let the Buyer be Well Informed – Doubting the Demise of Caveat Emptor' (1996) 55 *Maryland Law Review* 387; and JB Pomeranz, 'The State of Caveat Emptor in Alaska as it Applies to Real Property' (1996) 13 *Alaska Law Review* 237.

<sup>8</sup> Fraud (*Lukacs v Wood* (1978) 19 SASR 520); substantial error in relation to the identity or character of the property sold (*Tutt v Doyle* (1997) 42 NSWLR 10; *Minister for Education and Training v Canham* (2004) NSW Conv R 56-080); fraudulent concealment (*Ryan v Hooke* (1987) Q Conv R 54-238).

<sup>9</sup> See Weinberger, above n 7, 392.

<sup>10</sup> See Pomeranz, above n 7.

Although a seller was bound to ‘show good title’<sup>11</sup> according to the terms of the contract, a buyer was given the opportunity to investigate and ascertain the state of the title and was not able to later complain that they did not receive what was bargained for (caveat emptor). As a consequence of the risk to the buyer from the doctrine of caveat emptor, knowledgeable buyers made allowances in the market price of goods and land to reflect the risk. This also militated against intervention by the law either through the parliament or judicially.<sup>12</sup>

Although the principle flourished through the industrial society of the 19<sup>th</sup> Century the recognition of the disadvantages of the doctrine to a more complex and highly regulated property system began to emerge with the development of relaxations and exceptions by the courts<sup>13</sup> and ultimately with the introduction of consumer protection legislation in the 1970’s.<sup>14</sup> First, in the early 1900’s there was a recognition that a seller had a positive duty to disclose latent, as opposed to patent, defects in the title to the property.<sup>15</sup> This arose from a presumption that a seller should know their own property and a stronger recognition of the requirement for a seller to show good and marketable title to the land.<sup>16</sup> The second major development occurred after the Second World War with the increase in building within cities and the emergence of shoddy building work. Courts recognised that where new buildings were sold, an implied term of habitability should be implied and the principle of caveat emptor did not apply.<sup>17</sup> The third development came when the incidence of legislation relating to use, zoning and building standards which affected the land increased markedly in the early 1900s, town planning became more formalised and governments exercised powers of requisition and resumption of land, particularly during time of war. At that time there was a widening of the concept of defects in title to include local authority charges and statutory easements.<sup>18</sup>

The concept of a conventionally accepted defect in title however, ultimately became very narrow in compass and could not descriptively cope with government controls over land beyond the traditionally accepted interests voluntarily entered into such as leases, mortgages, easements and restrictive covenants.<sup>19</sup> The narrowness of the concept is especially evident in the case of inchoate interests affecting title to land. Even though a seller is aware of an interest that may impinge upon the title to the land in the future and it is a matter solely within the knowledge of the seller, there is no obligation at common

<sup>11</sup> *Lysaght v Edwards* (1876) 2 Ch D 499, 507 (Jessel MR).

<sup>12</sup> PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979) 180, 465-6.

<sup>13</sup> *Miller v Cannon Hill Estates* [1931] 2 KB 113 (introduction of a warranty of habitability for newly constructed residences).

<sup>14</sup> In 1974 s 52 of the *Trade Practices Act 1974* (Cth) introduced a prohibition on misleading and deceptive conduct. This extends to the conduct of sellers of real property and may be construed to require disclosure to a buyer to prevent the buyer from being misled. See also the discussion in L Griggs, ‘The 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 *Australian Property Law Journal* 76; Weinberger, above n 7.

<sup>15</sup> *Smith v Colbourne* [1914] 2 Ch 324. There was a presumption that the seller knew the condition of their own title: *Yandle & Sons v Sutton* [1922] 2 Ch 199, 210 (Sargant J).

<sup>16</sup> See Griggs, above n 14, 81.

<sup>17</sup> *Miller Cannon Hill Estates* [1931] 2 KB 113.

<sup>18</sup> *Re Belcham and Gawley’s Contract* [1930] 1 Ch 56; *Carlsh v Salt* [1906] 1 Ch 335 (notice from local authority to rebuild a party wall). For an explanation of these types of charges in contemporary conveyancing, see *Holland v Goltrans Pty Ltd (No2)* (1984) Q Conv R 54-149 (Derrington J diss).

<sup>19</sup> *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189, 15,193.

law to disclose.<sup>20</sup> For example, in *Dormer v Solo Investments Pty Ltd*,<sup>21</sup> the seller was aware of the possibility of a pipeline being laid across the property in the future but at the time of contract no easement had actually come into existence. In dismissing a claim by the buyer that the almost certain prospect of the pipeline easement was a defect in title, Holland J stated:

A vendor could be aware of countless possibilities which, because of facts known to him, could be described as real possibilities that the title of the future owners of his land or the value of his land to future owners might later be affected by events or action of parties over whom he has no control.<sup>22</sup>

Any matters which adversely affected the property (and especially its value) and which were not defects in title, properly so called, became known as defects in quality of title. There was no duty at common law to disclose these defects and the rule was always *caveat emptor*<sup>23</sup> in respect of them. However, as government agencies introduced more planning controls upon land, including restrictions upon building, buyers were concerned to know how the land might be affected, particularly if these restrictions affected the value of the land in their hands.<sup>24</sup> General restrictions imposed upon an area in which the land is situated, whilst affecting the use and value of the land, are not specific to a parcel and are therefore not, in law, regarded as defects in title.<sup>25</sup> Whilst these defects are not treated as defects in title,<sup>26</sup> they are still matters about which a buyer would wish to be apprised before entering the contract, and certainly, before settling the contract. Further examples of serious restrictions upon the use of the land affecting a buyer not amounting to defects in title include the likely prospect of a heritage listing precluding redevelopment,<sup>27</sup> non-compliance with local authority conditions relating to approval for a specific use,<sup>28</sup> unauthorised alterations to a building under contract,<sup>29</sup> and even the total absence of building approval.<sup>30</sup>

<sup>20</sup> A common requisition on title included the question as to whether the land being sold was affected by any proceedings or claim against the proprietor. Litigation affecting the land may follow the lodgement of a caveat to prevent dealings until an outcome is known. Equally, however, there might be litigation relating to the land the result of which may not lead to the creation of an interest in the land.

<sup>21</sup> [1974] 1 NSWLR 428.

<sup>22</sup> Ibid 433. Similarly, in *Tsekos v Finance Corporation of Australia Ltd* [1982] 2 NSWLR 347, it was held that negotiations between a seller and the local authority for the resumption of property being sold did not have to be disclosed to a buyer. See also *Carpenter v McGrath* [1996] 40 NSWLR 39 where the lack of formal building approval for a shed was not a defect in title although there was a risk of a notice being issued by the local government.

<sup>23</sup> *Turner v Green* [1895] 2 Ch 205; *Greenhalgh v Brindley* [1901] 2 Ch 324.

<sup>24</sup> For an explanation as to how these types of enquiries eventuated, see *Sargent v ASL Development Limited* (1974) 131 CLR 634, 637-8 (Stephen J).

<sup>25</sup> *Dell v Beasley* [1959] NZLR 88, 95 (McCarthy J); *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610, 624 (Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ).

<sup>26</sup> See JW Every-Burns, 'Town and Country Planning and Title to Land' (1950) 23 *Australian Law Journal* 431, 433; R Stonham, 'Town Planning Restrictions are not Defects in Title' (1961) 35 *Australian Law Journal* 7.

<sup>27</sup> *Brett v Cumberland Properties Pty Ltd* [1986] VR 107, 110 (Starke J).

<sup>28</sup> *Re Stranbay Pty Ltd and Catlow Pty Ltd* (1985) Q Conv R 54-180.

<sup>29</sup> *McInnes v Edwards* [1986] VR 161, 165 (Kaye J); also *Barber v Keech* (1987) 64 LGRA 116, 123 (Kelly SPJ).

<sup>30</sup> *Carpenter v McGrath* (1996) 40 NSWLR 39, 52-3.

From these examples it can be seen that there were many instances where the seller who had vital information affecting the value of a property at the date of sale had no obligation to disclose it to a buyer. This has led many commentators to criticise the doctrine of *caveat emptor* as outdated in the context of modern land usage and building and town planning regulation.<sup>31</sup> Whether there exists an obligation generated by the necessity for a seller to comply with the *Trade Practices Act 1974* (Cth) or Fair Trading legislation depends upon the factual matrix and cannot be assumed.<sup>32</sup> This is a significant part of the reason why statutory disclosure regimes were established.

The question is whether there is any consistency in their approach, whether they serve their ultimate purpose to inform a buyer of a serious problem with land, and whether the regimes themselves, now cause greater compliance problems for a seller than they provide benefit for a buyer.

### III WHY IS DISCLOSURE OF INFORMATION TO BUYERS THE PERCEIVED SOLUTION?

It is evident within the various statutory regimes governing seller disclosure that the key rationale for its introduction, is the perception that if buyers are better informed this will decrease any perceived inequality in bargaining power and allow the buyer to make a better decision.<sup>33</sup> Upon the introduction of s 52A of the *Conveyancing Act 1919* (NSW), which requires a seller to attach prescribed documents to a contract of sale and implies certain warranties into a contract of sale, it was stated:

The vendor offering a property for sale has more knowledge than the purchaser about matters affecting the land, such as easements, restrictive covenants and government affectations. It is preferable for the vendor to furnish information about the property rather than to have purchasers competing to obtain sufficient information to be able to exchange contracts in confidence.<sup>34</sup>

This is consistent with the considerable academic literature that has examined generally if mandatory information disclosure is a necessary and feasible response to a perceived lack of information.<sup>35</sup> This literature also suggests that a fully informed consumer will

<sup>31</sup> Griggs, above n 14; Weinberger, above n 7; Pomeranz, above n 7.

<sup>32</sup> For example, the usual home owner selling their residence would not be a corporation to be within the ambit of the *Trade Practices Act 1974* (Cth) nor would they be engaged in 'trade or commerce' for the purposes of the Fair Trading legislation.

<sup>33</sup> This is reflected in the discussion papers preceding the development of legislation in Tasmania and the Northern Territory: Tasmania Law Reform Institute, *Vendor Disclosure* (2004) AustLII 8 <<http://austlii.org/au/other/taslii/reports/5/>> accessed 4 September 2007; Northern Territory Government Department of Justice, *Vendor Disclosure Legislation* (2006) 11 <[http://www.nt.gov.au/justice/docs/lawmake/vendor\\_disclosure\\_paper2006.pdf](http://www.nt.gov.au/justice/docs/lawmake/vendor_disclosure_paper2006.pdf)> at 12 September 2007.

<sup>34</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 13 November 1985, 9494.

<sup>35</sup> See for example, GK Hadfield, R Howse and MJ Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 *Journal of Consumer Policy* 131; A Schwartz and L Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 127 *University of Pennsylvania Law Review* 630; H Beales, R Craswell and S Salop, 'The Efficient Regulation of Consumer Information' (1981) 24 *Journal of Law and Economics* 491; D Cayne and MJ Trebilcock, 'Market Considerations in the Formulation of Consumer Protection Policy' (1972) 23 *University of Toronto Law Journal* 396; R Craswell, 'Passing On the Costs if Legal Rules: Efficiency and Distribution in the Buyer-Seller Relationship' (1991) 43 *Stanford Law Review* 361.

be able to engage in negotiation with the seller of a product as to a suitable purchase price. Similar comments have emanated from the judiciary with Kirby J stating in *Timanu Pty Ltd v Clurstock Pty Ltd*:

the Court was not taken to the Second Reading Speech by the Minister introducing s 52A of the *Conveyancing Act*. Nor was it taken to any of the explanatory memoranda or background material. But the purpose of the legislation is clear enough. ... The plain object of the legislation is to reduce disputes concerning the representations about the land which are made by the vendor to the purchaser, to facilitate a proper judgment about the bargain at the time of the signing of the contract and to provide, at that time, a clear indication of the terms, conditions and warranties upon which the parties agree to contract. Effectively, the new procedure shifts the obligation from the purchaser to the vendor, so that the latter has to supply, rather than the former to discover, certain basic information about the subject land.<sup>36</sup>

In most jurisdictions, information about the subject land is given to the buyer or attached to the contract before signature by the buyer. Some of this information relates directly to title and some does not, being more properly described as information about the quality of title but nonetheless of significance to a buyer. The main aim of this strategy is to alert the buyer to any adverse matter affecting the land to alleviate the necessity for the buyer to undertake a search prior to contract to discover the information.

Clearly, having regard to statements from the judiciary<sup>37</sup> and parliamentary debates, the introduction of seller disclosure focuses on the interests of the buyer with obvious aims such as:

- (i) Lower search costs for buyers who if required to undertake pre-contract searches would lose the cost of these searches if no contract eventuated.<sup>38</sup>
- (ii) More accurate and up to date information furnished by a government agency, for example, by way of a certificate that a seller could furnish in respect of any particular matter.
- (iii) Certified government generated information should tend to neutralise any inaccurate representations made by a seller or seller's agent prior to contract in respect of the same subject matter.
- (iv) If the contract proceeds and the information is found to be incorrect, the buyer is usually afforded a statutory right to terminate or a right of compensation if the buyer proceeds with the purchase.

On the negative side however, an overly zealous approach to the protection of buyers has potential problems such as too much information being given (some of which a buyer does not need or know what to do with)<sup>39</sup> and a disproportionate cost burden on

<sup>36</sup> (1988) 15 NSWLR 338, 339-340 (emphasis added).

<sup>37</sup> *Timanu Pty Ltd v Clurstock Pty Ltd* (1988) 15 NSWLR 338, 339-340 (Kirby J)

<sup>38</sup> An objective noted in Duggan, 'Silence as Misleading Conduct: an Economic Analysis' in Richardson M and Williams P (eds), *The Law and the Market* (1995) 195, 216.

<sup>39</sup> C Camerer et al, 'Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'' (2002-2003) 151 *University of Pennsylvania Law Review* 1211, 1235; and in DM Grether, A Schwartz and LL Wilde, 'The Irrelevance of Information Overload: An Analysis of Search and Disclosure' (1986) 59 *Southern California Law Review* 277, 285 notes that

the seller in the preparation of the material. Any mandatory disclosure regime should therefore, aim to balance both the requirement for buyers to be appropriately informed about the property being purchased while minimising the cost to sellers of preparing disclosure documentation.<sup>40</sup>

#### IV ARE BUYERS OF REAL ESTATE BETTER INFORMED BY CURRENT SELLER DISCLOSURE REGIMES?

The underlying aim of most seller disclosure regimes is to ensure that buyers are better informed about property offered for sale so that a rational decision to purchase can be made. If seller disclosure of information is the most rationale response to information asymmetries why is it not in place in all jurisdictions? Can it be stated that buyers are better informed and make better decisions in jurisdictions with extensive seller disclosure than in jurisdictions with minimal seller disclosure? It is evident from documentation preceding the introduction of seller disclosure in Tasmania<sup>41</sup> and the NT<sup>42</sup> that very little evaluation or research has been undertaken into the effectiveness of disclosure regimes in meeting their aim of better informed consumers.

Having regard to the aims of seller disclosure stated above we propose to assess the effectiveness of seller disclosure regimes in providing a balance between the interests of buyers and the cost burden to sellers by examining three issues that link broadly to the content of disclosure, the manner of disclosure, and the timing of disclosure.<sup>43</sup>

First, we will examine the information required to be provided and how this compares with the information required to be disclosed at common law to determine if buyers are actually better informed of issues affecting the value of the land. Has this resulted in an absence of litigation alleging non-disclosure of factors affecting the value of the land?

Secondly, we will examine if the practice of furnishing information by way of a government certificate is more accurate than allowing sellers to prepare statements from their own knowledge and searches. Is this resulting in less claims by buyers against sellers for inaccurate information or misleading and deceptive conduct claims?<sup>44</sup>

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consumers report greater satisfaction with purchases if they perceive that they have more information to base their decision upon even if they did not use that information in their decision process.

<sup>40</sup> See principles of good regulation in G Banks, Chairman Productivity Commission, *Challenges for Australia in Regulatory Reform, Regulation Reform Management and Scrutiny of Legislation* (2001) Australian Government Productivity Commission 2 <<http://www.pc.gov.au/speeches/cs20010710>> at 22 February 2007.

<sup>41</sup> Tasmania Law Reform Institute, above n 33.

<sup>42</sup> Northern Territory Government Department of Justice, above n 33.

<sup>43</sup> The timing and manner of disclosure is suggested by other commentators to impact on the effectiveness of the disclosure at overcoming information asymmetry. Refer to S Stern, 'Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing' (2005) *Utah Law Review* 57; and L Griggs, 'The Content and Timing of Vendor Disclosure in the Sale of Residential Real Estate: Why Both must be Considered' (2006) *Australian Law Teaching Association Conference Paper* (available at [http://www.alta.edu.au/pdf/conference/published\\_papers/griggs\\_1\\_2006\\_alta\\_conference\\_paper\\_the\\_content\\_timing\\_of%20vendor\\_disclosure.pdf](http://www.alta.edu.au/pdf/conference/published_papers/griggs_1_2006_alta_conference_paper_the_content_timing_of%20vendor_disclosure.pdf)).

<sup>44</sup> The Tasmanian Law Reform Institute in its discussion paper on Vendor Disclosure identifies reduced litigation as a benefit of disclosure, above n 33, [11].



Thirdly, we will examine whether the provision of more information to buyers is relieving them of the previous need to search and make their own inquiries under the doctrine of caveat emptor. Are buyers undertaking fewer inquiries and therefore, obtaining appropriate information to inform their decision without incurring the same level of expense as buyers under a caveat emptor regime?

Alternatively, is the main benefit to the buyer a saving of costs in not entering the transaction at all?

The regimes in New South Wales and Victoria have been in place for a number of years and therefore provide the best study of the effect of disclosure on buyer behaviour. Queensland and Western Australia only provide for seller disclosure in the case of strata title lots while Australian Capital Territory, Tasmania and Northern Territory have either recently enacted legislation or current Bills. Consequently, there is very little relevant case law pertaining to the operation of the disclosure regimes except in New South Wales, Victoria and a little in Queensland.

## A *Comparison of Disclosure Regimes with Common Law*

### 1 *Common Law*

From the previous discussion of caveat emptor the following general principles concerning a seller's obligations of disclosure at common law can be drawn:

- (i) A seller is only required to disclose latent defects in the seller's title to the land that materially affects the property;<sup>45</sup>
- (ii) In the absence of a warranty, misrepresentation or fraudulent concealment, a seller is not required to disclose a defect in the quality of the seller's title no matter how material. A defect in quality of title is any matter affecting the use or enjoyment of the property that is not a defect in title;
- (iii) A seller does not warrant that the property is fit for the purpose for which it is bought or for any particular purpose.<sup>46</sup> In particular, where a building is already constructed there is no warranty that the building is fit for human habitation.<sup>47</sup>

At common law, the seller of land is only required to disclose to an intending purchaser the existence of defects concerning the title to the land. There is no requirement to disclose other defects irrespective of their impact on the value or use and enjoyment of the property. A seller could comply with this obligation by describing the defect in the contract of sale. For example, disclosure of an easement merely requires disclosure of 'Easement No K74930' in the contract. The expectation being that the buyer would obtain a copy of the easement and easement plan. In the jurisdictions with seller disclosure, this obligation is supplemented by requiring more details of defects in title to be given, such as a copy of the document, as well as requiring disclosure of a range of defects in quality of title.

<sup>45</sup> *Becker v Partridge* [1966] 2 QB 155. Patent defects (ie ones a buyer could see upon a reasonable inspection of the property) were not required to be disclosed: *Yandle and Sons v Sutton* [1922] 2 Ch 199; cf *Shepherd v Croft* [1911] 1 Ch 521.

<sup>46</sup> *Mitchell v Beacon Estates (Finsbury Park) Ltd* (1949) 1 P & CR 32.

<sup>47</sup> *Hoskins v Woodham* [1938] 1 All ER 692; *Ryde Municipal Council v Dyballa* (1956) 1 LGRA 254.

## 2 *Statutory Regimes*

Statutory regimes for seller disclosure in residential property transactions exist in New South Wales,<sup>48</sup> Victoria,<sup>49</sup> South Australia,<sup>50</sup> Australian Capital Territory<sup>51</sup> and Tasmania.<sup>52</sup> In Queensland<sup>53</sup> and Western Australia<sup>54</sup> there is only a statutory regime for seller disclosure of matters in strata title sales. No statutory disclosure regime for the sale of property exists in the Northern Territory. This paper will examine the regimes of seller disclosure for the sale of residential land, not being strata title.

Each jurisdiction approaches disclosure in a different manner providing a rich diversity of experiences for comparison, but this lack of uniformity and the apparent lack of research underpinning the choice of approach has in the writers' view a potential to disproportionately advantage the buyer and increase the cost of the sale to the seller. The only commonality within the regimes is the aim to lessen the impact of caveat emptor by requiring a seller to disclose all matters which may impact not only upon the title to the property but also its use and enjoyment. There are a broad range of matters a seller is required to investigate and disclose in all jurisdictions, some of which are common and others which it could be argued impact deleteriously on the cost of preparation for the sale of a property.<sup>55</sup>

Beyond the content of the disclosure obligations there is far less commonality. For example, in New South Wales s 52A(2) of the *Conveyancing Act 1919* (NSW) requires a seller of residential property to disclose a range of matters covering defects in title and defects in quality of title through a combination of documents and certificates attached to the proposed contract given to the buyer and statutory warranties. The warranties are those set out in cl 8 and pt 1 of sch 3 of the *Conveyancing (Sale of Land) Regulation 2005* (NSW).

The regime in Victoria however is a disclosure only regime with no statutory warranties. Section 32(1) of the *Sale of Land Act 1962* (Vic) was introduced in 1982 and provides that the seller shall give a very comprehensive statement of matters affecting the land to the buyer before the buyer signs the contract of sale and include in the contract a statement of those matters.<sup>56</sup> The statement includes matters relating directly to title<sup>57</sup> as well as a range of defects in the quality of title such as services connected to the land, planning and zoning and building prohibitions. In addition to the statement prepared by the seller, certain specified attachments are required to

<sup>48</sup> *Conveyancing Act 1919* (NSW) s 52A(2).

<sup>49</sup> *Sale of Land Act 1962* (Vic) 32(1).

<sup>50</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 7.

<sup>51</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT).

<sup>52</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 185(1). At the time of writing this Act had commenced (1 December 2006) but Pt 10 (seller disclosure provisions) had not commenced.

<sup>53</sup> *Body Corporate and Community Management Act 1997* (Qld) ss 206, 213, 223.

<sup>54</sup> *Strata Titles Act 1985* (WA) s 69.

<sup>55</sup> See Table 2, below.

<sup>56</sup> There are additional particulars required in the case of a residential sales contract: *Sale of Land Act 1962* (Vic) s 32(1A).

<sup>57</sup> This includes: particulars of any mortgage not to be discharged; any registered or unregistered charge imposed by statute; description of any easement, covenant or other similar restriction and particulars of any existing failure to comply with its terms; and details of any notice, order declaration, report or recommendation or approved proposal affecting the land including any notice of intention to acquire.

accompany the statement, being a copy of the certificate of title, evidence of the seller's power of sale where the seller is not the registered owner, evidence of subdivisional approval (where relevant) or evidence of progress toward subdivision (as relevant).<sup>58</sup>

Seller disclosure was introduced in South Australia in 1994 through s 7 of the *Land and Business (Sale and Conveyancing) Act 1994* (SA). There is no evidence of the inquiries undertaken by Parliament prior to enacting this legislation but it appears that the Victoria model of a seller statement was adopted. A seller is required, at least 10 days prior to settlement to serve a statement upon the buyer in a prescribed form<sup>59</sup> setting out amongst other things:

- cooling-off rights of the buyer;
- details of all mortgages, charges and encumbrances affecting the land;<sup>60</sup>
- all previous transactions with the land over the preceding 12 months; and
- a number of matters affecting the land.<sup>61</sup>

The prescribed form is more detailed than in Victoria essentially requiring the seller to disclose any matter affecting, presently or prospectively, title to, or possession or enjoyment of the land. All particulars as required by the prescribed form must be disclosed on the form unless a copy of the document with all details is attached to the statement. In the case of certain encumbrances,<sup>62</sup> which are registered on the title and are to be discharged or satisfied by settlement, no details are required.

The Australian Capital Territory adopted a similar approach to New South Wales with the *Civil Law (Sale of Residential Property) Act 2003*. Instead of a statement a seller is required to make 'required documents' available to a prospective buyer for inspection at 'all reasonable times' during the offer period.<sup>63</sup> A seller is excused from producing the

<sup>58</sup> *Sale of Land Act 1962* (Vic) s 32(3).

<sup>59</sup> *Land and Business (Sale and Conveyancing) Regulations 1995* (SA) sch 1.

<sup>60</sup> The expression 'encumbrances' is defined, in relation to land, as including easements (excluding those of a non statutory kind not registered in the title), rights of way, restrictive covenants, writs, summonses, warrants, caveats, liens, notices, orders, requirements, declarations, claims or demands and 'any other factor (whether similar or dissimilar to those mentioned above affecting, presently or prospectively the title to or the possession and enjoyment of the land': *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 3. See also s 12 of the *Land and Business (Sale and Conveyancing) Regulations 1995* (SA) which details 'prescribed inquiries' required for the statement.

<sup>61</sup> This excludes charges arising from the imposition of rates or taxes less than 12 months prior to the date of the service of the statement: *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 7(3).

<sup>62</sup> Mortgages, leases, liens, notices of intention to resume, or a notice under s 14 of the *Water Resources Act 1999* (SA).

<sup>63</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 10(1). This includes: (i) a copy of the proposed contract of sale; a copy of the certificate of title and deposited plan; (ii) a copy of any encumbrance on the title (eg an easement or restrictive covenant); (iii) details of any unregistered encumbrance; a copy of any lease conveyancing enquiry documents (heritage information, rent owing, development applications, lease breaches orders from local authority); (iv) certain information if the land is strata titled; (v) building conveyancing enquiry documents (planning documents, including Certificate of occupancy, survey plan, approved plans, drainage plan); (vi) an energy efficiency rating statement; (vii) all building and inspection compliance reports not more than three months old; (viii) a pest inspection report not more than three months old; and (ix) asbestos assessment report or advice (if applicable).

document if the seller cannot obtain it after taking all reasonable steps to do so.<sup>64</sup> Statements and reports are only valid if prepared by persons independent from the seller or the seller's agent.<sup>65</sup> The required documents form part of the sale contract<sup>66</sup> and a failure to make them available creates a strict liability offence against the seller.<sup>67</sup>

In addition to the required documents, in every contract for the sale of residential property, the following conditions apply,<sup>68</sup> except as disclosed in the contract:

- The property is sold free of encumbrances other than those disclosed on the certificate of title and the buyer is entitled to vacant possession and if the buyer becomes aware of a breach of these conditions the buyer may rescind the contract or complete the contract and claim damages.<sup>69</sup>
- There are no unapproved structures<sup>70</sup> and if the buyer becomes aware of such a structure before settlement, the buyer may insist that the structure be approved before settlement, in the absence of which, the buyer may rescind the contract.<sup>71</sup>
- That at the date of completion the seller will be the registered owner and there are no unsatisfied judgments, orders or writs affecting the property; and the seller has no knowledge of any current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property.<sup>72</sup>

Seller disclosure was introduced in Tasmania by Pt 10 of the *Property Agents and Land Transactions Act 2005* (Tas).<sup>73</sup> Tasmania, like the Australian Capital Territory and New South Wales, has chosen a combination of seller disclosure and statutory warranties but the manner of disclosure is different again. The central provision requires a seller when offering any type of land for sale to make information available to a buyer at nominated places<sup>74</sup> when requested by a buyer to do so.<sup>75</sup> A real estate agent who advertises property for sale must include a statement as to where the disclosure documents can be located.<sup>76</sup> The items to be disclosed include:

- a warning statement as a front page to be acknowledged by the buyer in writing;<sup>77</sup>
- a copy of the proposed contract;

<sup>64</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(2)(c).

<sup>65</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 9(3).

<sup>66</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(2).

<sup>67</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 10(2).

<sup>68</sup> If a contract does not contain these conditions expressly, then they are deemed to form part of the contract, *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(3).

<sup>69</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(a) and (b).

<sup>70</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(c).

<sup>71</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(d).

<sup>72</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(1)(g).

<sup>73</sup> At the time of writing this Act had commenced (1 December 2006) but the seller disclosure provisions had not commenced. This legislation originated from a report of the Tasmanian Law Reform Institute, above n 33, 26, which recommended the introduction of seller disclosure legislation 'to 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, or ought to know, or could reasonably obtain.

<sup>74</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 185(1).

<sup>75</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 185(2).

<sup>76</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 186(1). The disclosure statement must not be more than six months old: *Property Agents and Land Transactions Act 2005* (Tas) s 192.

<sup>77</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 191.

- a copy of the certificate of title and relevant registered plan;
- a local government certificate relating to council notices, planning permits, zoning, building completion, landslips and demolition orders;
- particular information if the land is subject to a strata scheme; and
- a vendor statement containing the prescribed information.<sup>78</sup>

Disclosure documents must be no more than six months old<sup>79</sup> and variations to the disclosure document are allowed. Variations must be notified to the buyer no later than five days after a change or no later than settlement, whichever first occurs.<sup>80</sup> In addition to this, there is an obligation upon the agent of the seller to disclose to a prospective buyer 'any information that the agent knows or ought reasonably to know is likely to affect a purchaser's decision to purchase the land'.<sup>81</sup> This seems a very far reaching requirement for which an agent in default is liable to compensate a buyer for any loss arising from non-disclosure.<sup>82</sup> It is also a very subjective claim - difficult to later defend if there was no evidence prior to contract as to what factors influenced a buyer's mind in the decision to purchase. The contract will also be subject to the implied terms in s 197:

- that the land is sold free of encumbrances other than encumbrances listed in the vendor's statement or, in the case of land that is subject to the *Land Titles Act 1980*, shown on the folio of the Register kept by the Recorder of Titles under that Act;
- that the vendor will, at the due time of completion, be able to complete the contract;
- that the information provided in the relevant disclosure documents required under s 190 is correct.

Any breach of one of these terms will entitle a buyer who becomes aware of a breach and suffers loss or more than 5% of the price to terminate the contract or complete and claim compensation.<sup>83</sup>

### 3 *Impact of Statutory Regimes on Common Law*

The statutory disclosure regimes generally aim to ensure that a buyer is apprised of all relevant defects and other information affecting the property to be purchased. The information required to be disclosed can appropriately be compared to the common law by considering first the obligation to disclose defects in title and secondly, the obligation to disclose defects in quality of title.

#### (a) *Defects in Title*

As previously stated, at common law a seller is obliged to disclose latent defects in the seller's title to the land that materially affect the property. A seller will also usually be

<sup>78</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 190. At the time of writing there was no prescribed information promulgated under the Act.

<sup>79</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 193.

<sup>80</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 193(2).

<sup>81</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 195(1).

<sup>82</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 195(2).

<sup>83</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 197.

required in a contract of sale to describe their title to the property. All statutory regimes, except for Victoria,<sup>84</sup> maintain the common law obligations and impose additional obligations by requiring the seller to disclose details of registered defects including copies of any relevant documents to the buyer. This will usually include a copy of the title and registered plan<sup>85</sup> and in New South Wales and Australian Capital Territory copies of registered encumbrances. The existence of unregistered statutory charges is also required to be disclosed under all disclosure legislation but there is no requirement in any jurisdiction for copies of documents related to the statutory encumbrance to be produced.

Queensland, Western Australia and the Northern Territory rely only on the common law obligation to disclose defects in title, although in Queensland the standard House and Land Contract<sup>86</sup> requires disclosure of unregistered statutory encumbrances.

The table below summarises a seller's obligations of disclosure under the statutory disclosure regime, the common law or under a standard contract.

**Table 1 – Comparison of Disclosure Obligations for Defects in Title**

	NSW	Vic	SA	ACT	Tas	Qld	WA	NT
Title details (Lot on Plan and CT reference)	CL	SD	CL	CL	CL	CL	CL	CL
Copy of Title and registered Plan	SD	SD		SD	SD	NR	NR	NR
Encumbrance details (registered)	CL	SD	SD	CL	CL + SW	CL	CL	CL
Copy of registered encumbrances and relevant plan	SD	NR	NR	SD	NR	NR	NR	NR
Unregistered statutory encumbrance (details) (sewerage and drainage)	CL + SW	SD	SD	SD	SD	SCR	CL	CL
Unregistered statutory encumbrance (relevant documents)	NR	NR	NR	NR	NR	NR	NR	NR

### Notes

SD – required to be disclosed under disclosure legislation

CL – required to be disclosed under common law principles

NR – no obligation at common law or under general statutory disclosure scheme for residential land

SCR – Standard Contract requirement

SW – Statutory Warranty

This comparison shows that the disclosure regimes continue to rely upon the common law obligation to disclose title details and encumbrances but require a seller in addition

<sup>84</sup> In Victoria there is a statutory requirement to disclose the information ordinarily disclosed at common law.

<sup>85</sup> New South Wales, Victoria, South Australia and the Australian Capital Territory.

<sup>86</sup> Real Estate Institute Queensland (REIQ) Houses and Land Contract 6<sup>th</sup> ed.

to hand over copies of documentation (title, plan, encumbrances) evidencing these interests. Most of the documents disclosed are available in the relevant Freehold Land Registers and, as will be seen, the majority of buyers confirm the disclosed information by undertaking their own searches. This raises the issues of double transaction costs with both the buyer and seller undertaking searches and the question of the perceived benefit of the document to buyers if there is a need to re-check the validity of the information given. These issues are considered further later.

(b) *Defects in Quality of Title*

In relation to defects in the quality of title the disclosure regimes make greater inroads to the doctrine of caveat emptor. Commonly, the legislation requires disclosure of planning information, building prohibitions, proposals affecting the land, proposed resumptions, details of rates and taxes for the land, and in some cases building and pest reports. As referred to above, this is achieved in the different legislation through a combination of disclosure statements and/or statutory warranties. In some cases, traditional defects in quality of title are required to be positively disclosed through direct statements to the buyer and, in other cases, there is a negative requirement, with disclosure only required if a statutory warranty is untrue. For example, in New South Wales, in addition to a s 149 statement under the *Environmental Planning and Assessment Act 1979* (NSW), the warranties (given as at the date of the contract) in cl 8 and Pt 1 of sSch 3 of the *Conveyancing (Sale of Land) Regulation 2005* (NSW) are extensive and include a warranty that the land is not subject to 'any adverse affectation', which effectively warrants, amongst other things, that the land does not contain any sewage authority assets, nothing in relation to any building or structure justifying an upgrading or demolition order or non-compliant improvements, no stock chemical residues, nor soil or vegetation conservation orders.

In Victoria, defects in quality of title are positively disclosed in the s 32 statement. This includes such information as services connected to the land, planning and zoning and building prohibitions. South Australia also adopted a seller statement approach but unlike Victoria the statement is prescribed by the *Land and Business (Sale and Conveyancing) Act 1994* (SA), sch 1. The information required by the prescribed form is very extensive and includes registered and unregistered encumbrances, lien, statutory encumbrances, environmental issues, building issues, stock routes, water allocations and heritage issues.

In the Australian Capital Territory, disclosure of defects in title occurs through the provision of the required documents<sup>87</sup> and in the statutory warranties.<sup>88</sup> In the proposed Tasmanian regime disclosure of defects in title occurs only through the disclosure documents, (primarily a local government certificate relating to council notices, planning permits, zoning, building completion, landslips and demolition orders) and the vendor statement. At the time of writing, the content of the vendor statement had not been prescribed but, if it is based upon the Tasmanian Law Reform Institute Issues Paper,<sup>89</sup> it is likely to include information in relation to planning and zoning, building

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<sup>87</sup> Statement about encumbrances not on the title, building conveyancing documents, energy efficiency rating statement, building inspection report, pest inspection report.

<sup>88</sup> Unapproved structures, judgements, orders or writs affecting the property.

<sup>89</sup> Tasmanian Law Reform Institute, above n 33.

works and condition, pests, heritage, flooding, water charges and other statutory encumbrances.

The table below provides a comparison between the jurisdictions of the obligations of disclosure, statutory warranties, contractual warranties and the common law.

**Table 2: Comparison of Disclosure of Defects in Quality of Title**

	NSW	Vic	SA	ACT	Tas <sup>90</sup>	Qld	WA	NT
Planning and Zoning information	SD	SD	SD	SD	SD	NR	NR	NR
Building prohibitions	SD	SD	SD	NR	SD	NR	NR	NR
Governments Notices, orders or proposals affecting the land	SW	SD	SD	SD	SD	CW	NR	NR
Judgements, orders or writs affecting the property	SW	NR	SD	SW	SD	CW		NR
Proposed Resumptions	SW	SD	SD	NR	NR	CW	NR	NR
Road widening or resiting proposals	SW	SD	SD	NR	NR	SW		NR
Building notices (demolition)	SW	SD	SD	NR	SD	CW	NR	NR
Approved plans/ building approvals	SW	SD	SD	SD + SW	SD	NR	NR	NR
Heritage/National Estate	SW	NR	SD	SD	SD	CW	NR	NR
Contaminated land	SD *	SD	SD	NR	SD	CW + SD <sup>91</sup>	NR	NR
Energy efficiency rating statement	NR	NR	NR	SD	NR	NR	NR	NR
Building and pest reports	NR	NR	NR	SD	NR <sup>92</sup>	NR	NR	NR
Asbestos assessment report	NR	NR	SD <sup>93</sup>	SD	NR	NR	NR	NR
Diving Fences	SW	NR	NR	NR	NR	NR	NR	NR
Vegetation orders	SW	NR	SD	NR	SD	NR	NR	NR
Structural defects in building	NR	NR	NR	NR**	SD	NR	NR	NR
Mining tenement	SW <sup>94</sup>	NR	SD	NR	SD	NR	NR	NR
Environmental protection orders and assessments	NR	SD	SD	NR	SD	CW	NR	NR
No right of access to the property via road	NR	SD	NR	NR	NR	CW	NR	NR
Flooding	SD*	NR	NR	NR	SD	NR	NR	NR

<sup>90</sup> This information is based upon the proposed information in the Tasmanian Law Reform Institute, *ibid*.

<sup>91</sup> If the land is on the Contaminated Land Register, a seller is required by s 421 of the *Environmental Protection Act 1994* (Qld) to make certain disclosures to the buyer.

<sup>92</sup> If a pest service has been carried out during the past two years details of the service may be required.

<sup>93</sup> Disclosure of existence and condition of asbestos in a building – other than a private dwelling.

<sup>94</sup> A right of way under s 164 or s 211 of the *Mining Act 1992* (NSW).



\* As part of a s 149 certificate under the *Environmental Planning and Assessment Act 1979* (NSW).

\*\* May be disclosed as part of building report

#### Notes

SD – required to be disclosed under disclosure legislation

NR – no obligation at common law or under general statutory disclosure scheme for residential land

CW – Standard Contract warranty

SW – Statutory warranty

From this analysis it is evident that there is significant variation across the jurisdictions ranging from no requirement, statutory or contractual, for sellers to go beyond the common law requirements (Northern Territory, Western Australia) to significant disclosure obligations in South Australia, New South Wales and Australian Capital Territory. The other variation is the use of either contractual or statutory warranties across the jurisdictions. While there is no seller disclosure regime for residential properties in Queensland, it is noteworthy that a number of defects in quality of title are covered by contractual warranties in the standard contracts promulgated by the Real Estate Institute of Queensland and the Queensland Law Society. There is also significant variation in the types of matters disclosed to buyers. Matters of particular note include:

1. Only in the Australian Capital Territory are sellers required to disclose building and pest reports, asbestos reports and energy efficiency ratings for residential property;
2. Only New South Wales and Tasmania (proposed) the disclosure of whether the property is subject to flooding;
3. Structural defects in a building are not currently required to be disclosed in any jurisdiction;
4. All jurisdictions with seller disclosure require disclosure of planning and zoning information and government notices or orders affecting the use or title to the property.

#### B *Are There Gaps in the Information Provided?*

It is clear from a précis of State and Territory regimes and the litigation emanating from a number of jurisdictions that not all information relevant to a buyer's decision to purchase is necessarily captured by the statutory disclosure obligations. To assess the gap we will analyse the litigation where a buyer has claimed that a seller failed to disclose information relevant to the purchase. This generally arises either under the disclosure legislation or involves a claim under the *Trade Practices Act 1974* (Cth) or State Fair Trading legislation for misleading or deceptive conduct.

First, an examination of the litigation reveals that even buyers in jurisdictions with substantial seller disclosure obligations are still bringing claims alleging non-disclosure of facts or information material to their decisions. These cases are fought predominantly under the *Trade Practices Act 1974* or relevant State *Fair Trading Act* on the basis that the buyer had a reasonable expectation that in the circumstances the seller would

disclose the information. This type of case gained notoriety with the decision of *Demagogue Pty Ltd v Ramensky*,<sup>95</sup> where the buyer of a strata unit in Queensland alleged that the seller failed to disclose the existence of a road licence required for access to the property and which would cost the body corporate \$1500 per year. A road licence was not a fact required to be disclosed by the then, s 49 of the *Building Units and Group Titles Act 1980* (Qld) and therefore, the seller had no duty to disclose. Despite this the Full Federal Court held that given the inquiries made by the buyer of the real estate agent, there was a reasonable expectation on the part of the buyer that such information would be disclosed.

Since *Demagogue* claims for misleading conduct by silence have been numerous with buyers alleging that despite the lack of an obligation on the seller to disclose the information, either at common law or under statute, a reasonable expectation of disclosure of the information arose in the circumstances and would have affected the buyer's decision to purchase. This has including claims about:

- a. the existence of termite damage or current infestations where this information was known to the seller and obviously affected the value of the property;<sup>96</sup> (Western Australia, Victoria, New South Wales);
- b. the fact the premises were the subject of a serious crime in the past;<sup>97</sup> (New South Wales);
- c. inability to use the property as a private residence;<sup>98</sup> (Australian Capital Territory);
- d. failure to reveal premises did not comply with a waste trade permit;<sup>99</sup> (Queensland);
- e. failure to disclose reports documenting the existence of contamination;<sup>100</sup> (Victoria and New South Wales);
- f. structural defects in the building;<sup>101</sup> (South Australia, Victoria); and
- g. Mining lease over the property;<sup>102</sup> (New South Wales).

These decisions reveal firstly, despite the extensive disclosure obligations in some States, there are still a range of factors not addressed in seller disclosure regimes which are generating otherwise avoidable litigation. Secondly, buyers are resorting to claims of misleading conduct where an obligation of disclosure does not exist, because such a claim is not hindered by the doctrine of caveat emptor and therefore, can have wide application to numerous items of information. Why is this not satisfactory for buyers? Firstly, buyers have to commence a claim to obtain a remedy and claims for misleading conduct are usually factually complex and a remedy is not always assured. Secondly, it will not apply to claims against individuals who are selling their private residence as

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<sup>95</sup> (1992) 39 FCR 31.

<sup>96</sup> *Franich v Swannell* (1993) 10 WAR 459; *Walker v Masillamani* [2007] VSC 172; *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189, 15,193.

<sup>97</sup> *Hinton v Commissioner for Fair Trading, Office of Fair Trading* [2007] NSW ADTAP 17.

<sup>98</sup> *Bowler v Hilda Pty Ltd* (1998) 153 ALR 95; *Laudenback v Biedrzycki* (1999) 210 LSJS 424.

<sup>99</sup> *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QCA 381.

<sup>100</sup> *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625; *Caltex Australia Petroleum Pty Ltd v Charben Haulage Pty Ltd* [2005] FCAFC 271.

<sup>101</sup> *Mitchell v Valherie* (2005) 93 SASR 76; *Kadissi v Jankovic* [1987] VR 255.

<sup>102</sup> *Borda v Burgess* (2003) 11 BPR 21,203 – failure to disclose a mining lease over the property. Not a defect in title because the coal was not being sold.

only claims against persons engaged in trade and commerce is possible,<sup>103</sup> leaving a significant number of buyers without recourse to this type of claim. Thirdly, a buyer will only be successful if the fact is something within the knowledge of the seller, there is no obligation by reason of the *Trade Practices Act 1974* (Cth) or fair trading legislation for the seller to make investigations about matters a buyer may expect disclosed. Fourthly, the *Trade Practices Act 1974* (Cth) will only have application to a failure to disclose if the buyer asks relevant questions that put the seller on notice of the buyer's expectation or the surrounding circumstances are such as to give rise to an expectation on the buyer's behalf.<sup>104</sup> Mere silence by the seller will not be sufficient.

There is clearly a need for greater consistency in disclosure obligations and for greater synergies between what buyers consider is relevant to their decision to buy and the obligations imposed by the statutory regimes.

### C Government Certificate or Seller Statement?

Our second inquiry is whether the practice of furnishing information by way of a government certificate, as in New South Wales, Tasmania and the Australian Capital Territory, is more accurate than allowing sellers to prepare statements from their own knowledge and searches. Is this resulting in less claims by buyers against sellers for inaccurate information or claims for misleading or deceptive conduct?

In New South Wales, the Australian Capital Territory and Tasmania the disclosure regime provides for certain documents to be attached to the contract of sale rather than a seller précisising the information in a statement. In Victoria, the legislation requires a seller statement containing certain information.<sup>105</sup> There have been a number of claims against sellers arising out of both the preparation of statements by sellers and the provision of certificates by local governments.

In New South Wales, claims by buyers include both claims in relation seller's mistakes in preparation and mistakes in the s 149 Certificate under the *Environmental Planning and Assessment act 1979* (NSW). The first type of seller mistake is the allegation that the seller has failed to disclose a fact or circumstance in compliance with the provisions of the legislation. This has resulted generally in arguments concerning an interpretation of the provisions and the obligations on the seller. This is generally because of complex disclosure obligations or warranties which are either out of date or unclear. For example in *Jones v Sherle*,<sup>106</sup> the buyer of a property in New South Wales argued that the seller failed to disclose a declaration under s 55 of the *Public Health Act 1902* (NSW) in relation to a flooding problem which adversely affected the property. Such disclosure it was argued was required by virtue of the warranties implied by s 52A(2)(b) of the

<sup>103</sup> Claims under the *Trade Practices Act 1974* (Cth) s 52 and the equivalents in all State and Territory fair trading legislation are limited to claims in trade and commerce. This will not apply to the sale of a private residence: *O'Brien v Smolonogov* (1983) 53 ALR 107. The fact a real estate agent is engaged does not change the nature of the transaction to one in trade and commerce: *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112

<sup>104</sup> For an example of the surrounding circumstances giving rise to the reason expectation see *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625.

<sup>105</sup> The Victorian approach is adopted in Queensland and Western Australia in the case of strata title disclosure.

<sup>106</sup> (1998) 9 BPR 17,005.

*Conveyancing Act 1919* (NSW) which at the time of contract warranted that there was no 'declaration under s 55 of the *Public Health Act 1902*'. The Supreme Court refused the claim because at the date of contract the *Public Health Act 1902* had been repealed and replaced by the *Unhealthy Building Land Act 1990* (NSW). The transitional provisions for the later Act provided that any declaration under the *Public Health Act 1902* was deemed a declaration under the new Act. It was not until 1995 (after the date of the contract) that the statutory warranty was changed. Therefore, the seller had not breached the warranty. Similarly in *Festa Holdings Pty Ltd (in liq) v Adderton*,<sup>107</sup> the seller was unable to hand over a certificate of insurance for building work undertaken by an unlicensed builder. The court held that insurance was not required by the relevant legislation (*Home Building Act 1989* (NSW)) and neither was it a defect in the seller's title requiring disclosure.

Buyers in New South Wales have been more successful in claims alleging a failure to disclose where the documentation disclosed is incorrect, such as in the case of an incorrect plan,<sup>108</sup> or where the mistake is due to the fault of the local government providing the notice and not a mistake of the seller in drafting a statement. In *Argy v Blunts & Lane Cove Real Estate Pty Ltd*,<sup>109</sup> a copy of the certificate was not properly faxed from the real estate agents to the solicitors for the seller, one page having been omitted inadvertently in the fax received. The missing page would have given the buyers information about a 100 foot strip along the waterfront boundary of the property which has been advertised 'as underdeveloped waterfront'. The buyers ascertained the true position after entry into the contract. Hill J found that the certificate with the missing page misdescribed the property in a material respect and the buyers were therefore permitted to rescind the contract.<sup>110</sup> That was an instance where the seller, or more particularly, persons acting on their behalf, their real estate agent or their solicitors, were negligent in the preparation of the contract in circumstances where a correct certificate had been supplied by the local authority.

Other cases concern where the information has changed between the date of contract and the date the buyer has sought a confirmatory Certificate from the local authority. In *Mandalidis v Artline*,<sup>111</sup> the local authority supplied a Certificate which indicated that there was no 'risk' affecting the property. However, following the exchange of contracts, the buyer's solicitors sought a fresh Certificate in which the local authority indicated that the Council had adopted a 'Policy on Aircraft Noise'. Under that policy there was a risk that a development or building may be subject to deferred commencement consent because of standards regarding aircraft noise. The buyer was permitted to rescind this contract as the deferment of building consent was proven to be a 'risk' which adversely affected the property in that consent to build may not have been given at a later date. A similar principle was applied in *Timanu Pty Ltd v Clurstock Pty Ltd*,<sup>112</sup> where the Certificate information indicated no affectation to the land by a road

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<sup>107</sup> (2004) 12 BPR 22,491.

<sup>108</sup> *Gibson v Francis* (1989) 5 BPR 11,101 where the description of the property in the contract was correct but the plan attached to the contract under the New South Wales disclosure provisions was incorrect. Despite the lack of any prejudice to the buyer the court allowed the buyer to terminate the contract.

<sup>109</sup> (1990) 26 FCR 112.

<sup>110</sup> *Ibid.*

<sup>111</sup> (1999) 47 NSWLR 568.

<sup>112</sup> (1988) 15 NSWLR 338.

widening proposal before contract, but the local authority indicated the existence of a proposal after contract when a fresh Certificate was obtained by the buyer. In both cases, the local authority had to make the call as to whether the particular phenomenon affected the land as they were the only source of the information for the Certificate.

In Victoria, a number of buyers have been motivated more by a desire in the buyer to avoid the contract on technical grounds rather than because of a genuine complaint about the state of the property being purchased. For example, in *Paterson v Batrouney*,<sup>113</sup> Beach J drew ‘the clear inference from the agreed statement of facts that after the plaintiff (buyer) executed the contract note, she simply changed her mind about the purchase of the property’.<sup>114</sup> However, it was held that there were other grounds to deny relief.

Similarly in *Fifty-Eighth Highwire v Cohen*,<sup>115</sup> the court raised the possibility that some buyer’s assertions as to their position because of inaccurate disclosure or non disclosure may be affected by ‘opportunism and hindsight’.<sup>116</sup> This was not, however, such a case with the court concluding the buyers had a genuine complaint. In that case, a seller failed to disclose in a s 32 Statement the existence of a sewerage drain servicing the property being sold and two neighbouring properties.<sup>117</sup> The drain ran under the dwelling on the subject property. The buyers purported to rescind the contract upon that basis. In confirming the buyers’ actions, the court found that the seller had neither acted reasonably (as it knew of the drain) and that the buyers’ claim that the property was reduced in value was substantiated.

In Queensland, buyers have raised faults in the disclosure by the sellers of strata title units on technical grounds unrelated to whether the buyer is prejudiced by the failure. These cases have usually concerned the process engaged in by the seller rather than the substance of the information disclosed. For example, under the *Body Corporate and Community Management Act 1997* (Qld) buyers have been successful in escaping contracts for the failure of sellers to put the correct version of a statutory information sheet on the front of the contract or placing the statutory warnings in the wrong order.<sup>118</sup> There is currently no reported decision where a buyer has successfully alleged that a seller statement is defective allowing termination. Similarly under the *Property Agents and Motor Dealers Act 2000* (Qld) where a seller of residential property is required to attach a warning statement to the contract as its first sheet, buyers have alleged predominantly technical failures to escape the contract. Buyers have been successful in a number of situations. In *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd*,<sup>119</sup> a buyer successfully alleged that the definition of residential property did not include the sale of two or more lots in the same contract. In *MNM Developments Pty Ltd v Gerard*,<sup>120</sup> a buyer was successful in claiming that sending a warning statement and contract via fax did not comply with the requirement

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<sup>113</sup> [2000] VSC 313.

<sup>114</sup> *Ibid* [37].

<sup>115</sup> [1996] 2 VR 64.

<sup>116</sup> *Ibid* 77.

<sup>117</sup> See also *Pricom Pty Ltd v Sgarioto* (1994) ATPR (Digest) 46-135.

<sup>118</sup> *Celik Developments Pty Ltd v Mayes* [2005] QSC 224.

<sup>119</sup> [2007] 1 Qd R 132

<sup>120</sup> [2005] 2 QdR 515.

to ‘attach’ the warning statement,<sup>121</sup> and in *Mark Bain Constructions Pty Ltd v Barling*,<sup>122</sup> that a ‘contract of sale’ under the Act included an option.

The analysis of cases in each jurisdiction reveals several concerns for the effectiveness of seller disclosure regimes using either certificates or seller prepared statements.

Firstly, the use of government certificates for the provision of information does not always provide the most accurate or current information. Local governments, like sellers, make mistakes and consequently, buyers are continuing to make inquiries in relation to the information in certificates to verify their accuracy in the same way they would if a seller prepared statements was given. Therefore, government certificates do not appear to provide any particular cost saving for buyers or necessarily provide them with better information. Government certificates can, however, have implications for the cost of a transaction to a seller, and this is discussed below.

Secondly, buyers looking for technical reasons to escape a contract have been successful in doing so in Victoria and Queensland where the legislation provides for seller disclosure statements and complex procedures for compliance. Often these buyers have been fully aware of the attributes of the property but have changed their mind. This has the potential to weaken the disclosure regime and increase the transaction costs for both buyer and seller.

#### D *Impact of Disclosure Prior to Contract*

The third aspect of our inquiry into whether a buyer is better informed by seller disclosure, is whether the provision of more information to buyers is relieving them of the previous need to search and make their own inquiries under the doctrine of caveat emptor. Are buyers undertaking fewer inquiries and therefore, obtaining appropriate information to inform their decision without incurring the same level of expense as buyers under a caveat emptor regime? Alternatively, do the seller disclosure regimes continue to force buyers to check the information provided by sellers to ensure its accuracy and to preserve any right they may have to escape a contract if a defect or inaccuracy is discovered? One of the advantages of a seller disclosure regime was stated by Duggan to be a lowering of search costs for buyers who if required to undertake pre-contract searches would lose the cost of these searches if no contract eventuated.<sup>123</sup> While this may be true of the Australian regimes, buyers who do enter a contract in reliance upon the disclosed information will usually undertake their own inquiries, particularly in a regime with significant statutory or contractual warranties where there is an assumption, evident in the remedial provisions of the legislation, that a buyer will check the information or warranties provided by the seller prior to completing the transaction, at which point the majority of remedies are lost.

For example, in New South Wales a buyer must be provided with a combination of documents and certificates attached to the proposed contract given to the buyer and

<sup>121</sup> See also *MP Management Pty Ltd v Churven* (2003) Q Conv R 54-581.

<sup>122</sup> [2006] QSC 48.

<sup>123</sup> An objective noted in Duggan, above n 38, 216.

statutory warranties.<sup>124</sup> Failure to annexe the documents does not make the contract void, but the buyer may rescind the contract within 14 days unless the contract is completed.<sup>125</sup> If any of the prescribed warranties are inaccurate a buyer is given a right to terminate the contract provided:

- (i) the right is exercised prior to settlement;
- (ii) the buyer was unaware of the matter at the time of contract;
- (iii) the buyer would not have entered into the contract if they had been aware of the matter; and
- (iv) the buyer has not with knowledge of the inaccuracy of the warranty affirmed the contract.<sup>126</sup>

The imposition of these restrictions on a buyer's right of termination for the seller's failure to disclose assumes that a buyer, acting properly, will need to verify the information disclosed and verify the accuracy of the warranties given by the seller. If the information is not checked and the matter comes to light after settlement no rights against the seller will exist. This increases transactional costs for the buyer. In New South Wales, it is also noteworthy that the buyer would normally seek a fresh certificate after exchange of the contract to ensure that the information contained in the statement remains current. The conveyancing practices in the jurisdiction also assume that two searches of the local authority are undertaken before and after exchange adding to transactional and administrative costs of the local authority providing the certificates.

The second point of note is the parallels between the legislation in New South Wales and the doctrine of *caveat emptor*. In the case of both the statutory and common law regimes:

- (i) a buyer must elect to terminate a contract prior to settlement for the failure to disclose a defect;
- (ii) the right to terminate may be lost through affirmation of the contract with knowledge of the breach; and
- (iii) a buyer who is aware of the defect at the time of contract is unlikely to be able to terminate.<sup>127</sup>

The only difference is the extent of the application of the right of termination to defects in title only, in the case of the common law and all defects in title or quality in the case of the statutory regime. The disclosure regimes in Victoria and the Australian Capital Territory similarly limit the remedies available to the buyer, to claims or action taken by the buyer prior to settlement.<sup>128</sup> Only in South Australia is there an argument that a

<sup>124</sup> The warranties are those set out in cl 8 and pt 1 of sch 3 of the *Conveyancing (Sale of Land) Regulation 2005* (NSW).

<sup>125</sup> *Conveyancing (Sale of Land) Regulation 2005* (NSW) cls 19(1)(a), 20(1)(a).

<sup>126</sup> *Conveyancing (Sale of Land) Regulation 2005* (NSW) cl 19(3). See for example *Azar Building & Construction Services Pty Ltd v Liristis Holdings Pty Ltd (Receivers and Managers appointed)* (2002) 11 BPR 20,523 (valid rescission pursuant to cl 19 where failure of seller to disclose adverse affectation in form of classification of land as having acid and sulphate soils).

<sup>127</sup> See for example *Harling Queensland Pty Ltd v Kelly* [2005] QSC 230.

<sup>128</sup> *Sale of Land Act 1962* (Vic) s 32(5); *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11(h).

buyer may obtain a remedy from a court for a defective disclosure statement where knowledge of the defect is obtained after settlement.<sup>129</sup>

Therefore, a buyer in most Australian jurisdictions, whether subject to seller disclosure or the common law, who does not prior to settlement undertake their own searches and satisfy themselves of the title and quality of the property will be unable to terminate the contract or obtain compensation, in the absence of misleading conduct or breach of contract, from a seller where the defect is discovered after settlement.

#### V BALANCING THE BENEFITS TO BUYERS WITH THE COST TO SELLERS – IS THIS BEING DONE?

The focus of government deliberations prior to the introduction of seller disclosure is usually on the lack of information available to a buyer and how the statutory regime can address the information imbalance between the buyer and seller.<sup>130</sup> However, as can be seen from the current analysis, there are a range of issues governments should also be considering prior to enacting seller disclosure legislation.

These issues include:

- (i) What information is relevant to a buyer's decision to purchase a property?
- (ii) In what form should the information be provided so that a buyer will read and use the information in the purchase? Is a government certificate better than a seller statement?
- (iii) Should buyers be given limited rights after contract to obtain compensation for defects not disclosed by a seller?
- (iv) Should buyers be forced to verify the information provided by a seller in order to ensure the disclosure is accurate?

The final issue which is rarely addressed by governments is the cost of disclosure to a seller<sup>131</sup> and whether this cost is justifiable. In other words, is the legislation aiming to balance both the requirement for buyers to be appropriately informed about the property being purchased, while minimising the cost to sellers of preparing disclosure documentation.<sup>132</sup> The cost of disclosure to a seller is not only the cost of preparation to the seller but also the costs thrown away if the transaction fails.

Increased transaction costs are disadvantageous to both sellers and buyers with the increased cost often passed onto buyers in the form of higher priced properties. Key aspects of Australian disclosure regimes that potentially impact on the cost of the transaction to the seller include:

<sup>129</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 15. In South Australia, it has been held that a buyer may waive their statutory termination rights by conduct based upon a seller's failure to serve a valid statement: *Astill v South Esplanade Developments Pty Ltd* (2007) 249 LSJS 334 (FC).

<sup>130</sup> See the discussion papers produced in Tasmania by the Law Reform Institute, above n 33 and Northern Territory Government Department of Justice, above n 33.

<sup>131</sup> Although the potential for increased costs to seller is recognised Northern Territory Government Department of Justice, above n 33, 11.

<sup>132</sup> See principles of good regulation in Banks, above n 40, 2.



- (i) Requirements for the information in certificates or seller statements to be accurate on the date it is given to the buyer;
- (ii) Requirements to update the information throughout the transaction;
- (iii) The ability of buyers to rely on inaccurate government certificates to terminate contracts with sellers; and
- (iv) The ability of buyers to terminate a contract for mistakes in a seller statement where the mistake is minor or does not prejudice the buyer.

#### A *Cost to Sellers of Obligation to Ensure Accuracy of Seller Statements*

The majority of seller disclosure regimes require information given to a buyer to be accurate at the date the information is given to the buyer. In New South Wales and Victoria, a seller is required prior to contract to provide a buyer with certain information in the form of a disclosure statement or, in the case of New South Wales, the documents specified by the *Conveyancing (Sale of Land) Regulation 2005*. In the Australian Capital Territory and Tasmania, the documents are not required to be given to the buyer but must be made available prior to contract in specified places.<sup>133</sup>

The obligation of accuracy presents several cost issues for a seller. First, if the contract is not immediately signed by the buyer, some of the certificates and other information may become dated and may need to be made current. This is relevant in all of the jurisdictions where the information is required to be accurate on the date the buyer receives the information.

Once a contract is entered into there does not appear to be a requirement in the Australian Capital Territory to update information, but if the property is on the market for a substantial period the information held by the agent will need to be reviewed regularly. In New South Wales, there are adverse effects for a seller where the incorrect document is attached to the contract notwithstanding the error is corrected prior to completion and the information is elsewhere in the attachments.<sup>134</sup> It has been held to be unlawful to add documents as attachments after the contract has been signed by the buyer as this would defeat the legislative purpose of the pre-contract disclosure. However, a court may take into account a post contract written clarification of a statement in a Certificate from a local authority providing that clarification refers to the position at the date of contract.<sup>135</sup> The serious consequences for sellers of providing out of date information makes the further checking of information by a seller an imperative, thereby raising the cost of a transaction if the property does not sell within a short period of time.

Second, in some jurisdictions there is a requirement for a seller to update the information given to the buyer if there is a change prior to settlement. This is required in South Australia<sup>136</sup> and Tasmania.<sup>137</sup> This continuing obligation to provide further

<sup>133</sup> *Civil Law (Sales of Residential Property) Act 2003* (ACT) s 10; *Property Agents and Lane Transactions Act 2005* (Tas) s 186.

<sup>134</sup> *Conveyancing (Sale of Land) Regulation 2007* (NSW) cls 19(1)(a) and 20(1)(a); *Gibson v Francis* (1989) NSW Conv R 55-458.

<sup>135</sup> *Copmar Holdings Pty Ltd v Commonwealth of Australia* (1988) 65 LGRA 137, 142-3 (Kearney J) (certificates not intelligible without further explanatory statement).

<sup>136</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 10.

disclosure to a buyer up to settlement places additional costs on the seller. Much of the information liable to change in this period is held by local government which, therefore, requires a seller to pay additional fees to check the information, if they are to comply with the requirements of the legislation.

### B *Cost to Sellers of Incorrect Government Certificates*

In all jurisdictions where a seller is required to disclose information held by a local or state government, the seller is reliant upon the authority providing to them the correct information. In New South Wales sellers are particularly exposed to increased costs or loss of a transaction due to the requirement to attach a s 149 certificate under the *Environmental Planning and Assessment Act 1979* (NSW) to a contract of sale. An incorrect statement in this certificate constitutes a breach of the statutory warranty under s 52A(2)(b) of the Act giving the buyer a right to rescind the contract.<sup>138</sup> The seller is very reliant upon the local authority properly completing the Certificate, which if incorrect, can lead to the termination of the sale and repayment of the deposit. The local authority effectively has to determine what might 'adversely affect' the land from the buyer's point of view.

From the exposition above in relation to claims against sellers for inaccurate certificates, it is evident that local governments often have difficulty in determining what might adversely affect land in the eyes of a buyer, in the absence of clear guidance by the legislature. Whether a certificate is correctly completed by a local government may depend on the efficiency of their internal processes and the ability of the relevant employees to ascertain the relevance of new policies or current proposals on land. As evident from the above cases<sup>139</sup> a seller is reliant upon the local authority in being accurate in the information it provides and it is possible that a seller, through no fault of their own, is unable to proceed and the deposit required to be forfeited. The New South Wales legislation does not protect the seller from negligence or error of the local or state government providing the certificate thereby increasing the transactional costs to sellers arising from incorrect certificates. This can be contrasted with the position under the South Australian legislation.

Like New South Wales, the *Land and Business (Sale and Conveyancing) Act 1994* (SA) allows a buyer to terminate a contract where a statement is not given or certified, or where the statement given is defective (inaccurate at the time it is given). The buyer may apply to the court, which may, if it is satisfied that the buyer was prejudiced by that failure, either avoid the contract, award damages for loss arising from the non-compliance, or make such order as it thinks just in the circumstances.<sup>140</sup> Unlike the position in New South Wales, however, the seller (or agent) may be relieved from liability under these provisions if the non-compliance was unintentional and did not occur through negligence, where the inaccurate information was supplied by another

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<sup>137</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 193(2).

<sup>138</sup> *Hijazi v Raptis* (2002) 11 BPR 20,487 (local authority wrongly stated that it had not adopted a resolution to restrict development of land due to the risk of flooding).

<sup>139</sup> See text at notes 114 and 115. See also *Hijazi v Raptis* (2002) 11 BPR 20,487 where information concerning the risk of flooding was not disclosed.

<sup>140</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 15 (damages may be awarded against the real estate agent where the agent has failed to comply with the Act. See s 15(3)(b).

party or body, or where the buyer signed a waiver having obtained independent advice from a legal practitioner in relation to waiving the requirement.<sup>141</sup>

While the South Australian requirements are by far the most exacting in terms of the information required to be disclosed, the legislation balances this by providing sellers who use their best endeavours to comply with a defence to a claim for termination. The Act also recognises that a seller will place heavy reliance upon government agencies to provide the relevant information and that there can be delays in accessing the files beyond the control of the seller or the seller's agent, mistakes in the files and lost files. The use of these mechanisms does not of course exclude other civil remedies under the *Trade Practices Act 1974* or *Fair Trading Act 1987* (SA) for misleading conduct by silence (non disclosure of a material matter).<sup>142</sup>

An alternative approach is taken in Victoria. Where the legislation provides that a buyer is unable to terminate the contract if after disclosure of the mistake or inaccuracy the buyer is in 'substantially as good a position as if all requirements had been complied with'.<sup>143</sup> While this provision has been used effectively in Victoria to thwart claims by buyers of a technical or minor nature, it would not assist a seller who relied upon information provided by a local government that was later found to be inaccurate.

### C Cost to Sellers of Minor or Technical Mistakes

The transactional costs for sellers involved in providing up to date information is increased where buyers are able to terminate for inaccuracies that are purely technical and do not result in material disadvantage to the buyer. A solution to this issue is offered by the Victorian *Sale of Land Act 1962* in which s 32(7) provides that regardless of the reason for the inaccurate disclosure or non-disclosure, at the end of the day, if the buyer is in 'substantially as good a position as if all requirements had been complied with', the buyer cannot rescind.<sup>144</sup> This gives the seller an opportunity to rectify the deficiencies usually by providing the information or correcting any error prior to settlement. Consequently, when the true position becomes known there may possibly be a finding that, despite the error, the buyer may not ultimately be adversely affected. For example in *Curtain v Aparo*,<sup>145</sup> the seller built over land in a registered easement without consent, disclosing the existence of the easement but not the breach. However, by trial, consent had been obtained and Gobbo J held the buyers were (at the time of trial) in 'as substantially as good a position as if the disclosure had not occurred'.<sup>146</sup> Provided the buyer's position is reserved until the truth is known, this seems to be an eminently sensible approach to the issue of inaccurate disclosure (for any reason) or non-disclosure as the consumer protection objectives of the legislation would have been

<sup>141</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 16.

<sup>142</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 35; *Piantadosi & Piantadosi v Tang* (2001) 215 LSJS 58.

<sup>143</sup> *Sale of Land Act 1962* (Vic) s 32(7).

<sup>144</sup> In *Fifty-Eighth Highwire v Cohen* [1996] 2 VR 64, Charles and Callaway JJA adverted to the question as to whether subjective or objective factors should be taken into account in permitting rescission by the buyer as to whether the fourth limb of s 32(7) was satisfied. This involved asking whether the buyer 'was in as substantially as good a position' as if proper disclosure had been made. If the buyer was in as good a position, rescission would not be ordered.

<sup>145</sup> (1988) V ConvR 54-316.

<sup>146</sup> *Ibid* 64, 051.

met and technical non compliance alone would not avail a buyer of an exit from the transaction. One of the only deficiencies of the system would appear to be that the operation of the section presumes that the agency or local government supplying the information to the seller has done so with accuracy as the information can only be relied upon at face value by the buyer and the buyer's representatives. There is no suggestion that the seller should go behind a certificate, for example, as to the existence of a valid building permit, before acting upon it.<sup>147</sup>

## VI CONCLUSIONS

As can be seen from this article, the application of the common law doctrine of seller disclosure of defects in title in conjunction with the principle of *caveat emptor* could never have survived conveyancing in a complex, modern world where successive governments have conspired to regulate what is built upon land, how it is built and how that construction may be used.

It is conceded that whilst land is a valuable commodity in itself, often value is given to land according to its lawful use. Potential buyers are probably now as concerned with this issue and such matters as the legality of the construction, the freedom from contamination and the fact that the land is not going to be resumed as they are concerned in respect of matters of title. Matters of title, given the advent of electronic land registries, are relatively easy and inexpensive pieces of information to acquire. It is matters of quality of title which require input from a greater variety of sources, sometimes reliant upon second hand information sourced through a local authority having been derived from another government agency, that have become the most problematic

The majority of operational regimes, notably New South Wales, Victoria, the Australian Capital Territory and South Australia require the seller to obtain a great deal of up to date pre-contractual information concerning the land being sold and to either append it to the contract (New South Wales), give it in a statement at the time of contracting (Victoria, Western Australia and Queensland) or to have it available to a buyer for examination prior to the buyer becoming bound by the contract (Australian Capital Territory). Much of this information would have to be sought again by a buyer to check its accuracy and currency. Queensland and Western Australia are the obvious exceptions here with a disclosure statement required to be given pre contractually only in the case of the sale of a strata title lot (or proposed strata title lot).

All of the information is again checked through a third party government agency (or through body corporate records) which was the source of the seller's information which means that both the buyer and seller incur search fees to achieve this outcome.

In New South Wales and Victoria, a buyer may rescind a contract prior to settlement generally if they discover that the information supplied was incorrect or omitted from the statement as at the date of contract and that the buyer would not have entered the contract if they had known otherwise (New South Wales) or if the buyer was not in substantially as good a position after the true position fact has been disclosed (Victoria).

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<sup>147</sup> *Mirabool Shire Council v Taitapanui* [2006] VSCA 30, [102]-[5].

Other jurisdictions allow the same result where ‘the buyer is prejudiced by the failure to supply information either at all or inaccurately’ (South Australia) or where a buyer is ‘materially prejudiced’ (Queensland and Western Australia) or where documents are not provided (Tasmania). There is similar language used in relation to breaches of warranty.

Litigation centres on the validity of statements, particularly the s 149 Certificate in New South Wales in relation to its accuracy and currency and in Victoria whether or not, given the infraction by the seller, whether the buyer is in substantially as good a position as if the disclosure had been regular. Litigation in Queensland is concentrated upon whether the seller has met the technical requirements of disclosure. There is very little litigation in the other jurisdictions from which conclusions can be drawn.

Very little literature exists upon the question of whether the ‘sign now, search later’ process in Queensland provides any more effective buyer protection than the heavy seller disclosure and warranty regimes in other States and Territories although there appears to be a general national consensus, Queensland and Western Australia apart, that a seller should be responsible for providing a considerable amount of both title and quality of title information about the land prior to settlement. Queensland and Western Australia places much more reliance upon the buyer’s ability to search and the effectiveness of their standard contracts to protect a buyer.

Speaking of the contents of disclosure statement required to be given by sellers in Victoria, Ormiston JA (with whom Callaway and Charles JJA agreed) said that ‘one should be careful not, by any extravagant interpretation of the legislation, to place such a burden upon vendors and their solicitors and agents as to make impractical the day to day business of conveyancing’.<sup>148</sup> His Honour was referring in that case to the degree of detail that may be required to be given to a buyer in relation to planning controls and building restrictions that may be necessary to discharge the seller’s onus under s 32 of the *Sale of Land Act 1962* (Vic). In discharging the seller in that case from making minutely detailed disclosure in relation to a road reservation (which had been generally disclosed), Ormiston JA made a significant point in relation to all seller disclosure. Only sufficient information need be given to a buyer to raise awareness of a possibly influential fact which the buyer can further pursue if interested should be needed to be given. Otherwise, the disclosure provisions become unworkable.<sup>149</sup>

This brings one to the final point. A buyer in New South Wales would wish to know very similar matters about restrictions upon the use of land and statutory charges to which they may become subject as a buyer in any other State or Territory. There is much merit therefore in adopting what may be called standard Australia wide disclosure protocols by which all legislation of this type should be measured. In 2001, Griggs in concluding remarks in his article, ‘A Draft Vendor Disclosure Statement-Consideration and Comparison’,<sup>150</sup> whilst supporting a relatively comprehensive seller disclosure statement did indicate that he wished that his ‘draft statement was intended to open the debate as to its suitability and need for Australian conditions’. We agree. Since his article was published there have been legislative developments in the Australian Capital Territory and Tasmania and a number of decisions in several jurisdictions. The time is

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<sup>148</sup> *Overton v Baker* [1997] 2 VR 297, 312 (CA).

<sup>149</sup> *Ibid* 313.

<sup>150</sup> Griggs, above n 4, 12.

right to examine the standardisation question further with a view to some more uniformity hopefully with a view to both simplify and lessen the cost of conveyancing to the consumer, both seller and buyer, whilst still fairly balancing their respective interests.