

TASMANIA
LAW REFORM
INSTITUTE

Vendor Disclosure

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Information on the Tasmania Law Reform Institute

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

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

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

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This final report is available on the Institute's web page at: www.law.utas.edu.au/reform
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Introduction and Background

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

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

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

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

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

Part 1 of this final report outlines the current Tasmanian law relating to vendor disclosure, which is essentially the traditional common law position of buyer beware. Part 2 of this report looks at the need to reform the law, giving the reasons why the Institute recommends the introduction of legislation requiring vendor disclosure in

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

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

³ At 26.

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

Tasmania. Part 3 looks at reforms in other Australian jurisdictions. Finally, in Part 4, the paper recommends the form and content of vendor disclosure legislation.

Summary of recommendations

That vendor disclosure legislation be introduced in Tasmania.

That the legislation apply:

- to all sales of land (private sales, sales by real estate agents and sales by auction)
- regardless of whether the vendor is a company, organization, trustee, receiver in bankruptcy, mortgagee, etc.
- to the sale of *all land* (including strata titles and commercial properties).

That the legislation provide that:

1. a seller of land (including strata titles) must make ‘disclosure documents’ available for inspection by a prospective buyer (or their agent) at all times when an offer to buy the property may be made to the seller.

Further to this –

- vendors (or their agents) must reasonably attempt to make potential purchasers aware that they can inspect the disclosure documents by notice in writing on any advertising material and by orally informing any potential purchasers who inspect the property or make an offer to buy the property.
- where land is for sale by auction, the disclosure documents should also be available for inspection at the place at which the auction is to be held for at least 30 minutes before the auction commences.
- exceptions may be made in certain conditions where council documents are not available.
- purchasers may waive the right to council documents in certain conditions and by a statutory form containing a warning.

2. the ‘disclosure documents’ include the originals or copies of:

- **the proposed contract;**
- **the certificate of title and (where relevant) the schedule of easements and covenants;**
- **specified certificates/documents;**

Further to this –

- that where certificates are used as disclosure documents the purchaser has the same rights against the provider of those certificates as the vendor would have.
- **A signed and witnessed ‘vendor statement’ disclosing specified information that the vendor knows or reasonably ought to know on the following matters:**

Length of ownership	Landslip
Nature of ownership	Mining Rights
Zoning, planning and uses	Transend easements
Building works	Legal liability
Building condition	Bankruptcy
Plumbing works etc	Encroachments
Unregistered easements, etc	Water charges
Historic Cultural Heritage Act	Other notices
National Estate/List	Chattels, etc
Flooding	Strata or Community Lot
- **if the property is part of a strata scheme:**
 - **a ‘strata title statement’ disclosing:**
 - that the property is part of a strata scheme and use of the property is subject to body corporate by-laws and requirements of the *Strata Titles Act 1998*;
 - information about the strata scheme;

- details of all body corporate funds to which owners contribute;
- details of any expenditure or liability the body corporate has incurred or resolved to incur and the liability of the lot owner.
- details of any arrears in the contributions payable in relation to the unit/lot.
- **specified strata title documents;**
 - a copy of the body corporate by-laws, or if none exist, a copy of the Model by-laws;
 - copies of insurance policies taken out by the body corporate including proof of currency.

and that –

- the disclosure documents must have been obtained no more than six months previously;
- the vendor statement contain a declaration that the information provided in it is accurate, and that the vendor is not aware of any inaccuracies in the other disclosure documents, or in the records on which those documents were based;
- if a vendor becomes aware that the disclosure documents contain an inaccuracy the documents must be amended as soon as possible and the inaccuracy must be brought to the attention of any purchaser who inspected the inaccurate documents and makes an offer to buy the property.

exception: a vendor statement should not be required if the property is being sold under a court order.

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

4. specified remedies be available to the purchaser.

It is not recommended that non-compliance with disclosure requirements constitute a criminal offence.

Part 1

The Current Law

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

The common law

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

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

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

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

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

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

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

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

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

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

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

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

⁸ [1996] 40 NSWLR 39

to local government or some other statute was not a sufficient ground to hold that there was a defect in title.⁹ As there was no defect in title, the vendor had no duty to disclose the information and the purchaser had no right to rescind the contract.¹⁰

As stated above, the ease with which a defect in title can be discovered will also affect the remedies available. Traditionally the courts will only grant rescission where the defect in title is 'latent'. A latent defect in title is a defect in title not discoverable upon a reasonable inspection of the property by the purchaser exercising ordinary care – the defect is concealed. This is contrasted to a 'patent' defect, which is obvious, unconcealed, and consequently need not be disclosed.¹¹ However, should the purchaser have knowledge of the latent defect, the vendor is no longer obliged to disclose it.¹²

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

- the lack of appropriate consent by the local council to use the building;¹³
- the walls of the house being outside the boundaries of the land;¹⁴
- the failure of building work to comply with plans and specifications;¹⁵
- the existence of a storm-water drain;¹⁶
- easements for water or sewerage supplies not discoverable on inspecting the surface,¹⁷ such as an underground culvert for water running across the land;¹⁸
- restrictive covenants,¹⁹ such as an undisclosed public or private right of way;²⁰ and
- the existence of sewer mains, or other pipes, connections or structures of supply authorities or services.²¹

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

- the possibility of a notice to repair or demolish being issued;²²
- an alleged contravention of building regulations;²³ and
- the particulars of title disclosing an obligation to grant an easement.²⁴

History and development of caveat emptor

The doctrine of caveat emptor largely developed in a time when the economy was agrarian based. However, it can be even be traced to early Jewish and Roman law.²⁵ As stated by Pomeranz:

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

¹⁰ The effect of the decision in *Carpenter v McGrath* has now been overcome by legislative initiative in New South Wales: *Conveyancing (Sale of Land) Regulations* (2000) (NSW) Schedule 3: Prescribed Warranties, (1)(d): 'there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has issued in relation to the building or structure since the matter arose.'

¹¹ *Yandle v Sutton* [1922] 2 Ch 199.

¹² *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 118-119 per Jenkins LJ.

¹³ *Vukelic v Sadil-Quinlan & Associates Pty Ltd* (1976) 26 FLR 457.

¹⁴ *Horning v Pink* (1913) 13 SR (NSW) 529, contrast *Dickie v O'Callaghan* (1886) 12 VLR 756.

¹⁵ *Long v Worona Pty Ltd* (1973) 1 BPR 9109 (purchaser not entitled to rescind because of special conditions in contract).

¹⁶ *Torr v Harpur* (1940) 40 SR (NSW) 585.

¹⁷ *Micos v Diamond* (1970) 72 SR (NSW) 392.

¹⁸ *Re Puckett and Smith's Contract* (1902) 2 Ch 258.

¹⁹ *Re Roe and Eddy's Contract* [1933] VLR 427.

²⁰ *Yandle v Sutton* (1922) 2 Ch 199.

²¹ *Micos v Diamond* (1970) 92 WN (SNW) 513.

²² *Barber v Keech* (1987) 64 LGRA 116; *Carpenter & Anor. v McGrath* [1996] 40 NSWLR 39; noted in P. Butt 70 *ALJ* 951; followed in *Sullivan v Dan* [1997] NSW ConvR 56,314.

²³ *McInnes v Edwards* [1986] VR 161.

²⁴ *Dougherty Bros Pty Ltd v Garde* (1976) 2 BPR 9206.

The doctrine of *caveat emptor* as it applies to real estate originated in England during the Middle Ages, a time when agriculture was the sole purpose of land. The doctrine was premised on the purchaser's ability to discover and protect himself from defects in the property through prior inspection, since the quality of the land took precedence over the quality of the structures of the land. Furthermore, it was assumed that the vendor and purchaser were of equal bargaining positions and engaged in arm's-length transactions, and that the buyer therefore did not need special protection.²⁶

English case law authority for the principle can be seen to emanate from the decision of *Chandelor v Lopus*.²⁷ In this case a goldsmith sold a jewel to another representing that it was a 'bezar' stone.²⁸ It was subsequently discovered that this was not the case. The purchaser sought relief. This was denied. The court held that the seller had not guaranteed the character of the stone, indeed the obligation was on the purchaser to ascertain the fairness of the transaction.²⁹ This principle was soon applied to land.³⁰ *Caveat emptor* was then to flourish given the pre-eminence of laissez-faire economic ideas during the change from the agricultural age to the industrial revolution of the 19th century. Atiyah notes:³¹

If the responsibility for ensuring that a man acquired a reasonable purchase at a fair price were thrown upon the purchaser, they argued, then the purchaser would assuredly take the trouble to examine what he was buying with due care. Shoddy goods would disappear from the market, or if buyers in fact were willing to buy them at prices reflecting their poor quality, then the goods would find a market at that price and deservedly so. All this would follow from throwing the responsibility upon the purchaser, without any legislation or litigation.³²

In essence, *caveat emptor* was permitted to grow because of the belief that government should adopt a non-interventionist policy in the regulation of private contracts. Society would prosper by allowing each individual to pursue her or his own economic gain.³³ In the context of land transactions this principle of *caveat emptor* has not only led to the purchaser assuming the risk of defects in the quality of the land, but also the assumption of risk upon the entry into a contract for the purchase of land, the assumption of risk occurring even though the purchaser had not yet entered into possession. Risk was to be imposed on the purchaser from the date of signing, with little if any scope for public regulation at the hand of the government for matters considered to be private law.³⁴

The weakening of caveat emptor in other jurisdictions

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

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

²⁵ See A Rogerson, 'Implied Warranty against Latent Defects in Roman and English Law' in D Daube (ed) *Studies in Roman Law of Sale*, 1959, 112 at 113.

²⁶ JB Pomeranz, 'The State of Caveat Emptor in Alaska as it Applies to Real Property', (1996) 13 *Alaska Law Review*, 237 at 238.

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

²⁸ The bezar or bezoar stone was found in the stomach or intestines of animals and was once considered an antidote to poison.

²⁹ See the comments of the Court at 79 Eng. Rep. 3 at 4.

³⁰ See WH Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 40 *Yale Law Journal* 1133 at 1165.

³¹ PS Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979.

³² Atiyah, above n. 31 at 465.

³³ See the comments by MR Cohen, 'The Basis of Contract', (1933) 46 *Harvard Law Review* 553 at 558.

³⁴ As stated by D Fitzgerald, 'The Risk Issue in Sale', (1995) 9 *Journal of Contract Law Lexis* 1 at 6: 'The law on risk crystallised out in its final form in the 19th century - a time 'when the courts were anxious to develop rules favourable to sellers in order to encourage business activity. Indeed, risk law was well settled to the prevailing ethos of economic expansion brought on by the industrial revolution. The basic presumption that property and risk pass at the time of contract generally assured sellers of payment, regardless of the hazards involved in delivery. The law on risk also accorded with the precepts of laissez-faire. This is because the risk issue was not dealt with substantively by the courts so as to potentially interfere with commerce; it was left alone to be determined by the intention of the parties as to passage of risk or property.' (citations deleted).

[A]s society grew more complex, courts slowly abandoned the doctrine of caveat emptor, at least in the area of residential real estate. They increasingly imposed stricter disclosure requirements as well as implied warranties in the sale of housing. One reason for this shift is the dramatic change in home-buying practices that occurred after World War II. As the demand for residential real estate increased, builders began producing houses in mass quantities. This frequently left buyers unable to closely inspect the real estate for defects prior to purchase. In addition, the increasing complexity of houses made it more difficult for the buyer to detect hidden defects. As a result of these changes, the courts were increasingly pressured to abandon the doctrine of caveat emptor.³⁵

Pomeranz goes on to discuss numerous cases in which English and American courts have modified or refused to apply the doctrine of caveat emptor, beginning with the English case of *Miller v Cannon Hill Estates Ltd*³⁶ in 1931, which has since been adopted by a number of American courts.³⁷ Pomeranz concludes that ‘the doctrine of caveat emptor as it applies to residential real estate has been greatly eroded in most [American] states.’³⁸

These developments in other jurisdictions could have some influence on Tasmanian courts considering the application of caveat emptor, but the strength of this influence is difficult to predict.

Consumer protection laws

Consumer protection legislation was introduced into Australia in the form of the *Trade Practices Act* and the state equivalent fair trading legislation with the effect, among other things, of imposing an obligation on vendors and agents to disclose matters where purchasers would have a reasonable expectation that the information would be passed on.³⁹ Such provisions have obvious potential in relation to vendor disclosure. However, these Acts apply only to transactions which occur in ‘trade and commerce’. While this may be of some assistance in relation to property sold under a contract for the sale of a business, it has been held that the sale of private residential real estate is not a transaction in ‘trade and commerce, even when conducted via the agency of a real estate professional.’⁴⁰ Accordingly, consumer protection legislation has had little impact upon the disclosure obligations imposed on vendors of residential property.

Standard form contracts

In Queensland, Western Australia and the Northern Territory the standard form contract used for the sale of residential property has been developed to promote vendor disclosure. However, the standard form contract used in Tasmania provides little protection to purchasers, essentially reinforcing the principle of caveat emptor by only addressing matters which would amount to a defect in title (for example clause 5 states that the property is sold with all registered and apparent easements). The Tasmanian standard form contract does not address matters which would affect the quality of the title or value of the property (for example whether there is planning approval for all structures on the land, or existing proposals by local council affecting the use of the land).

³⁵ Pomeranz, above n. 26 at p. 239-240 (citations deleted).

³⁶ *Miller v Cannon Hill Estates, Ltd* [1931] 2 KB 113.

³⁷ Pomeranz, above n. 26 at p. 239-242.

³⁸ Pomeranz, above n. 26 at p. 242.

³⁹ E Webb, ‘Has Caveat Emptor Become Vendor, Lessor and Agent Emptor – Silence, s52 of the *Trade Practices Act 1974* (C’t) and Real Property Transactions’, (1995) *APLJ Lexis* 21.

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

Summary

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

Part 2

The Need for Reform

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

- Proposals by local and statutory authorities to resume the land or to acquire an easement or some other proprietary interest in the land.
- Planning restrictions (eg restrictions on use imposed by planning laws or council planning schemes) and environmental hazards (such as contamination) burdening the property.
- Illegal structures and breaches of building regulations that may give rise to a council right to procure the issue of a demolition order⁴¹ or may lead to the issuing of a building order requiring work to be carried out.⁴² A defect in title, and thus obligation on the part of the vendor to disclose, only arises where the council has decreed an order or given notice of demolition.⁴³ The existence of illegal structures (such as sheds, decking, carports) is an area of significant practical concern in Tasmania. The vendor is unlikely to disclose such matters and so the purchaser takes the risk of council demolition at the time of contract.⁴⁴ Moreover, a solicitor acting for a purchaser is unlikely to seek a certificate of completion for building works or a building certificate as there is a danger that in doing so the council will be alerted to defects, leading to the possibility of a demolition order. Therefore, as the law presently stands, the vendor has no interest, indeed a positive disincentive, to disclose any illegally constructed structures on the property.
- Similarly, if the vendor is aware of defects in the quality of improvements to the property or any structure on the property materially affecting its value, he or she need not disclose this to the purchaser.⁴⁵

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

- Unfortunately the reality is that vendors and real estate agents will not always be full and frank in disclosing potentially important information to prospective purchasers.⁴⁶
- The current conveyancing practice in Tasmania is that the purchaser signs a valid contract before obtaining legal advice, and often without this type of potentially important information about the property. Greater disclosure would therefore provide much needed assistance to purchasers in making their decision (both the decision to purchase and the decision about what terms to include in the contract) and in negotiating a fair price for the property. This is particularly so in a 'sellers market'.⁴⁷ The absence of cooling-off periods in Tasmania heightens this need. Proposals are currently being prepared by the Government to introduce cooling-off periods in Tasmania.⁴⁸ Under the current law in Tasmania once a contract is signed it is binding and enforceable on both parties. Cooling-off periods are a period of time (current proposals are that this be 2 full business days) after the signing of a contract during which a purchaser can elect to withdraw from (avoid) the contract.⁴⁹ If cooling-off

⁴¹ *Carpenter v McGrath* (1996) 40 NSWLR 39.

⁴² *Building Act 2000*, s 170.

⁴³ *Fletcher v Manton* (1940) 64 CLR 37.

⁴⁴ While a potential purchaser can in theory seek authorization from the owner to apply for a building certificate certifying that the general manager of the council does not intend to take any action under the Building Act in relation to the building (*Building Act 2000*, s 119(1)(c)), in practice it may be unlikely that vendors with something to hide would grant such authorization. Furthermore, delays in councils issuing building certificates mean they may be able to offer little assistance to most purchasers.

⁴⁵ *McInness v Edwards* [1986] VR 161.

⁴⁶ 'One [real estate agent in Tasmania] has already been charged with misrepresentation and the office of consumer affairs is investigating further claims by potential home buyers. The director of consumer affairs and fair trading, Roy Ormerod, says the number of complaints against [real estate] agents is rising...': *ABC News Online* 'Real estate agents warned over scams' 16/8/2004, <http://www.abc.net.au/news/newsitems/200408/s1177445.htm> (accessed 16/8/04).

⁴⁷ i.e. where demand for property is greater than availability.

⁴⁸ Media release, Attorney-General's office, 31/1/04.

⁴⁹ It has been proposed that the penalty for doing so would be minimal: \$100 or 0.2% of the purchase price: *Office of Consumer Affairs and Fair Trading* 'Pre Contractual Disclosure and Cooling Off Periods for Real Estate Sales' Discussion Paper, July 2004.

periods are introduced, then it is in the interests of vendors that purchasers enter contracts as fully informed as possible about the property, so that it is less likely that purchasers are using the cooling-off period as a chance to find out about the property and possibly withdraw from the contract of sale.

- The complexity of modern residential real estate makes it desirable for information to be directly supplied to the purchaser. It is much easier for the vendor to obtain and supply this information than for each potential purchaser to do so.
- Full and complete information on a property allows the market to operate at its optimal efficiency; the imprecision of the common law relating to vendor disclosure has the potential to promote litigation.
- Requiring vendor disclosure may encourage home owners to obtain council approval for building and renovation works.
- Requiring vendor disclosure would bring Tasmania into line with the law in the other jurisdictions⁵⁰ and reflect the trend of the law towards greater consumer protection.⁵¹

⁵⁰ New South Wales, Victoria, South Australia, and most recently, the Australian Capital Territory, have introduced legislative measures requiring vendors to disclose certain information when selling residential property. In Queensland, Western Australia and the Northern Territory the standard form contract used for the sale of residential property has been developed to promote vendor disclosure.

⁵¹ For example the introduction of the *Trade Practices Act 1974* (C'th) and the fair trading legislation.

Part 3

Reforms in Other Jurisdictions

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

- To ensure that purchasers possess more information about the property prior to purchase in order to reduce the imbalance in bargaining power between the parties;
- To ensure (given the complexity of modern residential realty, and the innumerable Federal, State and Local government restrictions that may attach to a title) disclosure of matters that may impact on the decision to purchase residential property, so that purchasers can make informed decisions;
- To recognise that the magnitude of the obligations associated with home ownership 'may not be fully realised until subsequent reflection free from the blandishments of the real estate agent';⁵² and
- To recognise that, in many instances, the vendor is in a better position to provide information about the property than the purchaser is to discover it.

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

The legislative frameworks operating in these states informed the consideration of the appropriate form and detail for vendor disclosure legislation in Tasmania. This Part outlines those legislative frameworks. Part 4 details the Institute's recommendations for vendor disclosure legislation in Tasmania.

New South Wales

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

First, certain documents must be annexed to the contract of sale before the purchaser signs it:⁵³

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

Failure to annex the prescribed documents does not render the contract void. Rather, the purchaser can rescind within 14 days of entry into the contract, unless the contract has been completed.⁵⁴ This remedy is available regardless of whether the purchaser can show that the failure amounted to conduct that misled or deceived them.⁵⁵

⁵² AJ Bradbrook, SV MacCallum and AP Moore, *Australian Real Property Law*, (2nd ed., LawBook Co., Sydney, 1997) at [5.69].

⁵³ *Conveyancing Act 1919* (NSW) s 52A(2)(a), the documents are prescribed by the *Conveyancing and Sale of Land Regulation 2000*, clause 5 and Schedule 1.

⁵⁴ *Conveyancing (Sale of Land) Regulation 2000*, clause 19(1)(a), 20(1)(a).

⁵⁵ *Gibson v Francis* (1989) 5 BPR 11,101 at 11,103.

Secondly, the vendor is deemed to make a prescribed warranty to the effect that:⁵⁶

- except as disclosed in the contract, the land is not subject to an ‘adverse affectation’;⁵⁷
- the land does not contain a sewer vested in a public sewerage authority;
- the planning certificate annexed to the contract specifies the true planning status of the land;⁵⁸ and
- there is no matter in relation to any building or structure on the land that would justify the making of any upgrading or demolition order, or if there is such a matter, a building certificate has been issued.

If this warranty is breached the purchaser may rescind the contract at any time before completion⁵⁹ provided that the purchaser was unaware of the matter which ought to have been disclosed when the contract was made and the purchaser would not have entered into the contract if they had been aware of the matter.⁶⁰ The purchaser loses their right to rescission if they elect to affirm the contract.⁶¹

Victoria

Vendor disclosure is required in Victoria by s 32 of the *Sale of Land Act 1962*. Under the Victorian legislative regime the vendor must disclose the following in a signed statement:⁶²

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

⁵⁶ *Conveyancing Act 1919* s 52A (2)(b), *Conveyancing and Sale of Land Regulation 2000* clause 7; schedule 3 Part 1.

⁵⁷ This is defined by an exhaustive list (Part 3, Schedule 3 of the *Conveyancing and Sale of Land Regulation 2000*). Amongst other things it includes:

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

⁵⁸ Note the exception: the true planning status in relation to the matters contained in schedule 4, item 3 of the *Environmental Planning and Assessment Regulation 1994*.

⁵⁹ *Sale of Land Regulation* clause 20(1)(b).

⁶⁰ *Sale of Land Regulation* clause 19(3).

⁶¹ *Zucker v Straightlance Pty Ltd* (1987) 11 NSWLR 87.

⁶² *Sale of Land Act 1962*, s 32(2).

Where a vendor supplies false information or fails to supply all the information required the purchaser may rescind a contract entered into on the basis of that information⁶³ at any point before completion or becoming entitled to possession or rents and profits.⁶⁴ However, the purchaser may not rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if the relevant disclosure had been made.⁶⁵ The burden of proof lies with the vendor.⁶⁶

Australian Capital Territory

In the ACT the newly introduced *Civil Law (Sale of Residential Property) Act 2003* came into effect on 1 July 2004. This legislation seeks to balance the rights of the seller and buyer. The legislation introduces comprehensive reforms to counter gazumping,⁶⁷ a five-day cooling-off period and compulsory vendor disclosure. The vendor disclosure is by way of the vendor making the following documents available to all prospective purchasers throughout the time that an offer can be made:⁶⁸

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

It is an offence if a seller does not make the required documents available for inspection by a prospective buyer.⁶⁹

The following conditions must also be included in all contracts for the sale of residential property:⁷⁰

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

On completion of a contract for the sale of residential property, the seller is entitled to reimbursement from the buyer for the cost of obtaining a building inspection report and a pest inspection report.⁷¹

⁶³ Reliance or inducement need not be shown: *Fifty-Eighth Highwire Pty Ltd v Cohen* (Victorian Court of Appeal, Brooking, Charles and Callaway JJA, 7 February 1996, unreported).

⁶⁴ *Sale of Land Act 1962* (Vic) s 32(5).

⁶⁵ *Sale of Land Act 1962* (Vic) s 32(7).

⁶⁶ *Urban No1 Co-Operative Society v Kilavus* [1993] VR 201 at 205, 210.

⁶⁷ Gazumping occurs when a seller breaks their promise to sell a property to a buyer after having orally accepted the buyer's offer. See the comments of Mr Stanhope, (Chief Minister, Attorney-General, Minister for Community Affairs and Minister for the Environment, (2003) Week 7 *Hansard*, 26 June, 2003 p.2529).

⁶⁸ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 9.

⁶⁹ The offence is one of strict liability, punishable by a maximum of 10 penalty units: *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 10.

⁷⁰ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 11, see Appendix B.

⁷¹ *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 18.

If the buyer becomes aware of an error in the description of the property before completion of the contract the buyer may –⁷²

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

South Australia

The *Land and Business (Sale and Conveyancing) Act 1994* (SA) provides that at least 10 days before settlement the vendor must serve on the purchaser a statement in the form prescribed by regulation⁷³ setting out:⁷⁴

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

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

Where a vendor makes a defective statement in relation to one of these matters that prejudices the purchaser, the purchaser may apply to the court for an order declaring the contract void and/or awarding damages or making any other order that is just in the circumstances.⁷⁵ Furthermore, failing to comply with these disclosure requirements constitutes an offence punishable by a fine of up to \$2,500.⁷⁶ It is a defence in criminal or civil proceedings if:⁷⁷

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

The Act also specifically provides that it does not affect the existence of any other civil remedies.⁷⁸

An earlier proposal for vendor disclosure in Tasmania

In 2000 a Tasmanian report⁷⁹ prepared for the Office of Consumer Affairs and Fair Trading proposed that legislation requiring vendor disclosure be introduced to Tasmania:

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

...

The relevant information is to be presented as answers to questions in the prescribed vendor form. This information will comprise, on behalf of the vendor, a contractual commitment that the information is true and accurate. The legislation will provide that any loss arising from any inaccuracy of the information is

⁷² *Civil Law (Sale of Residential Property) Act 2003* (ACT), s 11(h).

⁷³ *Land and Business (Sale and Conveyancing) Regulations 1995* (SA), Schedule 1.

⁷⁴ *Land and Business (Sale and Conveyancing) Act 1994* (SA), s 7.

⁷⁵ s 15.

⁷⁶ s 14.

⁷⁷ s 16.

⁷⁸ s 35.

⁷⁹ *Vendor statements and a cooling off period for real estate sales*, prepared by S Hayes for the Office of Consumer Affairs and Fair Trading, Department of Justice (Tas), August 2000.

recoverable by the purchaser from the vendor. Such a loss is to be recoverable within a period of three years from the date of any agreement for sale.

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

A draft vendor disclosure form that was included in the report is reproduced in Appendix A of this paper.

Part 4

Recommendations

The Institute recommends the introduction of vendor disclosure legislation. The model recommended by this report is intended 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, ought to know, or could reasonably obtain.

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

In summary, it is recommended that:

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

Application

It is recommended that the legislation apply to *all sales* of land – whether private sales or sales by real estate agents. This includes sale by auction. The legislation should apply regardless of whether the vendor is a company, organization, trustee, receiver in bankruptcy, mortgagee, etc.

It is recommended that the legislation apply to the sale of *all land* (including strata titles). In the Issues Paper it was proposed that the legislation should only relate to residential property,⁸⁰ however this is not recommended for the following reasons:

- while some business purchasers may be more capable of taking care of their own interests than residential real estate purchasers, others may not be (particularly where small businesses are concerned) – vendor disclosure could assist them;

⁸⁰ The ACT legislation only applies to residential property and in SA disclosure is not required if land is sold under a contract for the sale of a business, however the NSW legislation applies to any land as does the Victorian (although it has a few extra disclosure points for land on which there is a residence).

- while the concerns of purchasers of businesses may be different, at least the disclosure information would give them a starting point for their enquiries;
- vendor disclosure would not impose a great burden on vendors of commercial property (if the sale occurs in ‘trade and commerce’ then it would already be subject to consumer protection legislation such as the *Fair Trading Act*);
- it is difficult to satisfactorily distinguish between residential and commercial property, particularly because many businesses in Tasmania are conducted from properties which are, or were formally, residential properties, and which may well be used solely as residential properties again.

The form and timing of disclosure

1. a seller⁸¹ of land must make certain ‘disclosure documents’ available for inspection by a prospective buyer (or their agent) at all times when an offer to buy the property may be made to the seller;

The aim of disclosure is to inform the purchaser of matters relevant to the decision to buy. It is therefore essential that disclosure occur *before* this decision is made. Disclosure should not occur at the exchange of contracts. It is recommended that the ‘disclosure documents’ must be available for potential purchasers to inspect from the date that the property is on the market, and that vendors (or their agents) must reasonably attempt to make potential purchasers aware that they can inspect the disclosure documents by notice in writing on any advertising material and by orally informing any potential purchasers who inspect the property or make an offer to buy the property.

In addition to these requirements, it is recommended that where land is for sale by auction, the disclosure documents should also be available for inspection at the place at which the auction is to be held for at least 30 minutes before the auction commences.

The Institute recognises that the preparation of the disclosure documents will cause a delay between the decision to place a property on the market and the property actually being placed on the market. The Real Estate Institute’s response⁸² to the issues paper expressed particular concerns in this regard:

...concerns exist over the requirement of 337 certificates and 132 rates notification to be provided BEFORE any marketing can proceed on any given property for sale.

In reality, some Councils are equipped and prepared to provide this service in a fast efficient manner – others are not. In the case of the latter many agents and vendors will be penalised by the time delay in these services being provided. Some sectors of the market will experience financial hardship as a result of this sort of delay (e.g. the elderly and low income families).

It is hoped that councils will recognise the increased importance of these certificates being provided in a timely manner and will respond to this need accordingly. A legislative requirement that such certificates be provided within a set time period could also be introduced.⁸³ It is recognised that delays may cause inconvenience and perhaps even financial hardship in some instances, perhaps particularly where one property is bought subject to the sale of another property. On the other hand, most purchasers who buy a property subject to the sale of another property may have already anticipated the need to prepare for the sale of their own property or will in fact already have placed their property on the market. It is the Institute’s firm view that any inconvenience caused by delays in preparing the disclosure documents is outweighed by the benefits of disclosure. Nevertheless, in recognition of the fact that hardship may be caused in some instances by delays in

⁸¹ As discussed above, this would encompass all sellers – regardless of whether the sale is being handled by a real estate agent or privately, or is for sale by offer or auction.

⁸² Written correspondence, Martin Harris, 11/8/04.

⁸³ For example: ‘in South Australia there is a requirement that councils, statutory authorities and prescribed bodies who receive a request to provide property information required under the *Land and Business (Sale and Conveyancing) Act 1994* must provide the applicant with that information within eight business days. In Tasmania any similar requirement would primarily apply to the Local Government Certificate provided under section 337 of the *Local Government Act 1993* and the time period would need to be longer than eight days. The imposition of a timeframe could address concerns that have been raised about the timeliness with which information is currently provided.’: *Office of Consumer Affairs and Fair Trading ‘Pre Contractual Disclosure and Cooling Off Periods for Real Estate Sales’ Discussion Paper*, July 2004.

the supply of s 337 certificates, it is recommended that where there is proof that a s 337 certificate has been applied for, a property may be placed on the market for sale despite the certificate not being available for inspection if there is a clear notice within the disclosure documents stating that the certificate has been applied for but is not currently available for inspection, and summarising the information that is usually provided by s 337 certificates. It is also recommended that no contract for the sale of that property is to be signed until 2 working days after all the disclosure documents are available for inspection (or if the purchaser inspected the incomplete disclosure documents, two full business days after they have been informed that the certificate is available for inspection)⁸⁴ unless the purchaser waives the right to inspect the certificate. It is recommended that such a waiver be required to be in a statutory form, prescribed by regulation. The form should summarise the information that is usually provided by s 337 certificates, state that the purchaser is aware of their right to view the s 337 certificate and waives this right. A clear warning should appear at the top of the form stating ‘this is a form to waive a legal right – you may wish to seek legal advice before signing this document’.

The ‘disclosure documents’

2. the ‘disclosure documents’ should be defined by the legislation to include the originals or copies of:
- the proposed contract
 - the certificate of title and the schedule of easements and covenants
 - specified certificates/documents
 - a ‘vendor statement’
 - if the property is part of a strata scheme:
 - a ‘strata title statement’; and
 - specified strata title documents

the proposed contract

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

the certificate of title and the schedule of easements and covenants

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

- the title number as a volume/folio reference
- a description of the land
- the current owner’s name and tenancies held⁸⁵
- any registered easements, mortgages, covenants, encumbrances, caveats, etc
- a list of any unregistered dealings⁸⁶
- a copy of the plan of title

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

⁸⁴ If cooling off periods are introduced it would be acceptable for a contract to be able to be signed, but for the cooling off period to commence upon the provision of all the disclosure documents.

⁸⁵ only leases for a term exceeding 3 years may be registered: *Land Titles Act 1980*, s 64.

⁸⁶ i.e. a dealing of which the Land Titles Office has notice, but which has not yet been registered because, for example, it is subject to amendment or requisitions.

General law land

If a property has not yet been registered under the *Land Titles Act (1980)* then it is recommended that an Abstract of Title be one of the required disclosure documents.

specified certificates/documents

Under current conveyancing practices in Tasmania a number of searches for information relating to the property are carried out by the purchaser (or more usually their solicitor) between the signing of the contract of sale and the settlement date. Some of these searches are, in relation to some properties at least, of a rather precautionary nature,⁸⁷ and so it would be unduly onerous for the certificates or documents that these searches produce to be required disclosure documents. Rather, such information can be covered in the 'vendor statement' (see discussion below). It is recommended that the following certificates and documents be specified 'disclosure documents':

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

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

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

It has been suggested to the Institute⁸⁸ that despite these documents being provided, cautious vendors/solicitors may often choose to obtain updated certificates prior to settlement, particularly in relation to s 337 certificates. This will result in reduced savings to those purchasers. However, as vendor disclosure is not recommended as a cost saving measure, this is seen by the Institute to be acceptable (presumably such cautious vendors/solicitors would also be most welcoming of vendor disclosure legislation). However in an attempt to reduce the need for such caution, it is recommended that it be provided by the legislation that where such certificates are used as disclosure documents that this gives the purchaser the same rights against the provider of those certificates as the vendor would have. The provision could be similar to that in the NSW legislation,⁸⁹ which provides:

s 52A(3) Notwithstanding the provisions of any other Act (whether assented to before, on or after the commencement of the Conveyancing (Amendment) Act 1985) or any other law, where a vendor attaches to a contract for the sale of land a certificate or other document, or a copy of a certificate or other document, issued, on or before the date of the contract, to the vendor or to a person on the vendor's behalf by a government department, a statutory authority, the council of a local government area or a prescribed person or body, being a document:

- (a) which is, or a copy of which is, required to be attached to the contract pursuant to subsection (2)(a),
- (b) which contains information consistent with the provisions of a term, condition or warranty prescribed as referred to in subsection (2) (b), or
- (c) which contains information which has caused the vendor to make a specific disclosure in the contract in relation to any such term, condition or warranty,

the purchaser or a mortgagee of the purchaser shall have and may exercise, in relation to the certificate or document, the rights, powers and immunities that the purchaser or mortgagee would have had if the certificate or document had been issued to the purchaser or mortgagee.

⁸⁷ For example, carrying out a landslip search if the property is in inner-city Hobart.

⁸⁸ telephone conversation, Phillip Kimber, 31/8/04.

⁸⁹ *Conveyancing Act (1919)* (NSW).

Building Certificates

The owner or purchaser of a building may apply to the general manager of a Council for a building certificate certifying that the general manager does not intend to take any action under the *Building Act 2000* in relation to the building.⁹⁰ Such a certificate would be beneficial to potential purchasers as it acts to assure the purchaser that the building is either in compliance with Council requirements, or if not, that any non-compliance will not result in the issuing of a demolition order or building order (eg requiring that building work be carried out). On the other hand, the costs and delays produced by requiring such certificates may be substantial.⁹¹ For this reason it is not recommended that a building certificate be a required disclosure document. Rather, it is recommended that the vendor disclose any non-compliance that they are aware of in the vendor statement (see discussion below). Where a potential purchaser is concerned about the accuracy of such information in the vendor statement they will of course still be free to undertake further requisitions, enquiries of Council, or apply (or request the owner to apply) for a building certificate.

Mr Robert Menzie, a lawyer who responded to the issues paper⁹² stated –

The provision of a copy of the certificates issued by the local council pursuant to section 337 of the Local Government Act is of limited benefit, in my view, to the average purchaser. The average purchaser is unable to adequately interpret the document and on their face documents can be misleading or fail to provide sufficient information. Areas of concern in that regard are:

- 1.1 Zoning issues;
- 1.2 Building lines;
- 1.3 Issues relating to certificates of occupancy;
- 1.4 Issues in relation to certificates of completion;
- 1.5 Housing Indemnity Act issues, in particular those relating to owner builders;
- 1.6 Water supply issues;
- 1.7 Septic tank and sewerage disposal issues.

I am convinced that the average person will not be aware of the importance of some of these issues and others which I have not mentioned and will be unaware of the need to explore those matters prior to signing a contract. The provision of a copy of the certificate would be inadequate and provide limited security to a purchaser. Unless there is a proposal to clarify some of these issues further in the vendor statement then the simple provision of a certificate will not provide very much practical or useful information to the average person prior to signing a contract.

Two examples illustrate some of my concerns:

Example 1:

If a 337 certificate was provided, for example, on a property in the area under the control of the Huon Valley Council and governed by the Esperance Planning Scheme 1999 and if the zoning was shown as “Rural C” then a residence is a discretionary use except where the application is for a house on a lot which existed as a separate title prior to the coming into effect of that scheme or a lot created by a subsequent boundary adjustment of a lot which existed as a separate title prior to the coming into effect of that scheme. That additional information is not provided and is unlikely to be in any sensible format. Advice that the property was zoned “Rural C” really addresses nothing and provides no certainty that a vacant block of land could be built on.

Example 2

Question 33 on the 337 certificate refers to a certificate of occupancy. I suspect that the average purchaser would not be aware of what is meant by a certificate of occupancy. The reference to such a certificate is deceptive. It is my understanding of the legal position that a certificate of occupancy cannot be required for a building which was lawfully being used as a residence prior to the commencement of the Local Government (Building and Miscellaneous Provisions) Act 1993. The average purchaser will not be aware of that and is likely to effectively be misled by the answer.

⁹⁰ *Building Act 2000*, s 119.

⁹¹ Discussions with councils and solicitors indicated that the costs of building certificates vary from around \$50 to \$350 and the time between applying for a certificate and having the certificate issued can be as short as a day or so or as long as 2 or 3 weeks.

⁹² Written correspondence, 12/7/04.

Although the detail supplied in s 337 certificates in relation to the zoning of the land and other issues may sometimes be fairly uninformative (eg “Rural C”), it is the Institute’s view that the vendor should not be required to explain the information provided in the disclosure documents in relation to these matters. The primary purpose of vendor disclosure is to make important information available to the purchaser at an earlier date. While it is ideal that information is presented clearly, it should not be the vendor’s responsibility to explain and interpret documents provided by statutory bodies such as councils. Under the current conveyancing system the purchaser or their solicitor would apply for the s 337 certificate, usually, *after* a valid contract has been signed, and then interpret that certificate, making further enquiries of the local council if necessary.⁹³ Under the recommended vendor disclosure scheme, the certificate would be immediately available, and the purchaser’s solicitor could offer prompt advice on any matters needing explanation or clarification *before* any contract is signed (such as planning zones or certificates of occupancy). Of course there may be some purchasers who will sign a contract despite being unclear about the meaning of some of the information presented in the disclosure documents and without seeking legal advice on those matters or making enquiries of the body who provided the information. While this may lead to unfortunate results, it is the Institute’s view that it would be going too far to require vendors to explain and interpret the disclosure documents in an attempt to protect such impulsive vendors. Furthermore, the purchaser or their conveyancer or solicitor can assess and interpret the information in the disclosure documents, or the additional information sought and received from the body that provided the documents, with the purchaser’s interests in mind, which may be difficult for the vendor or their solicitor to do.

a ‘vendor statement’

The vendor statement should disclose information that the vendor *knows or reasonably ought to know* about the matters that are currently the subject of searches for information from statutory bodies by the purchaser and the purchaser’s requisitions. The remedies available (see below) will mean that purchasers will be able to rely on the information given in the vendor statement, and so will no longer need to carry out many of these searches,⁹⁴ nor make requisitions. Vendors may choose to verify some facts in the statement by attaching verifying documents. If a fact is particularly important to a particular purchaser, and it is not verified by documentation, that purchaser will of course still be able to verify or explore the matter further for themselves by carrying out the relevant searches or making purchaser’s requisitions.

While some duplication of information is acceptable, in the interests of keeping the vendor statement clear and concise the statement should avoid addressing matters that are addressed by the other disclosure documents. As these matters are subject to change it is recommended that the form and content of the vendor statement be provided for by regulation rather than statute. It is also recommended that it be required that there appear a warning in bold and in at least 8 pt font (Arial or Times New Roman) at the top of the vendor statement to the following effect:

In this statement the vendor discloses matters of which they are aware, or reasonably ought to be aware. The vendor may be legally liable for losses resulting from inaccuracies in this statement. Any vendor or purchaser who is unsure about the questions or answers in this statement is advised to consult a solicitor.

It is recommended that the vendor must sign the vendor statement, declaring that the information disclosed in the statement is accurate to the best of his or her knowledge, and it is further recommended that this signing must be witnessed by a person who is not the vendor’s agent or solicitor.

Taking into consideration the matters that are currently covered by the other disclosure documents, in particular the Certificate of Council Rights in or Powers Over Land (section 337 certificates), it is recommended that the following matters be addressed in the vendor statement:

⁹³ For example, it is fairly simple to telephone the Huon Valley Council and have the meaning of “Rural C” explained.

⁹⁴ Although it has been suggested that cautious vendors/solicitors may still chose to do so (telephone conversation, Phillip Kimber, 31/8/04).

Length of ownership

How long the vendor has owned the property. This will give some indication to the purchaser of how much knowledge about the property the vendor may have been able to draw upon when completing the vendor statement.

Nature of ownership

Whether the vendor holds the property personally or as trustee. Additionally the documents should note whether it is a mortgagee sale, sale by an official receiver, etc.

Zoning, planning and uses

Whether the land is currently being used for a use that is not permitted. It should also be stated whether any planning or building permit has been refused during the vendor's ownership or in the last 3 years, whichever is the shorter, and if so details should be provided. The statement does not need to address whether the property is subject to a planning scheme, or the zoning of the property under the planning scheme, or whether there is a current planning permit applying to the land, as these matters are all dealt with by the Certificate of Council Rights in or Powers Over Land.⁹⁵

Building works

Whether the owner is undertaking or has undertaken any building works on the property, or is aware of any building works undertaken on the property by a previous owner, for which all the legally required authorisations, consents, approvals and insurance policies⁹⁶ have not been, or were not, obtained.⁹⁷ While it is not recommended that a building certificate⁹⁸ be one of the required disclosure documents (see discussion above), vendors may wish to attach such a certificate in relation to this point.

Building condition

Whether there are any structural faults with any building or structure on the property that are not easily discernable on inspection. Whether there is any asbestos in any building or structure on the property. Whether any building or structure on the property suffers from other significant problems that are not easily discernable on inspection, such as: dampness related problems (such as rising damp, wet or dry rot, mould), leaks, recurring wall or ceiling cracks, or plumbing problems. *However*, it is recommended that if a current⁹⁹ building inspection report is attached to the vendor statement these matters not be required to be disclosed as long as the vendor declares in the vendor statement that the vendor is not aware of any inaccuracies in the report. Further, it is recommended that it be statutorily provided that where such a report is so attached the buyer has a cause of action against the person who prepared the report. Such a provision could be similar to that in the ACT legislation.¹⁰⁰

Plumbing works, etc

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

Unregistered easements, etc

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

Historic Cultural Heritage Act 1995

Whether the property is registered (or provisionally registered) in the Heritage Register,¹⁰¹ and if so details should be provided.¹⁰²

⁹⁵ See more detailed discussion above.

⁹⁶ for the purposes of the *Housing Indemnity Act 1992*.

⁹⁷ While many vendors may not know exactly what approvals etc are legally required, if they are unsure whether the required approvals etc have been obtained it is appropriate that they explore this matter further with the Council or a solicitor – just as they would currently do when answering similar questions in the requisitions.

⁹⁸ *Building Act 2000*, s 119.

⁹⁹ The report should be no more than 12 months old.

¹⁰⁰ *Civil Law (Sale of Residential Property) Act 2003*, s 19 – reproduced in Appendix B.

¹⁰¹ as kept by the Heritage Council under the *Historic Cultural Heritage Act 1995* s 15.

National Estate/List

Whether the land or the premises is on the Register of the National Estate¹⁰³ or is on the National Heritage List or Commonwealth Heritage list,¹⁰⁴ and if so details should be provided.

Flooding

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

Landslip

Whether the property is in a declared landslip area under the *Mineral Resources Development Act 1995*¹⁰⁵ or in a landslide zone.

Mining Rights

Whether there are any mining rights affecting the property.

Transend easements

Whether Transend Networks Pty Ltd have any easements on the property (to carry electricity).¹⁰⁶

Legal liability

Whether there are any unsatisfied judgments, orders or writs affecting the property; or any current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property, including a claim under the *Family Law Act 1975* (C'th) or the *Partition Act 1869* (Tas). Whether the property, or any part of the property, is currently being possessed or used by any person in such a way as may lead to claim of adverse possession.

Bankruptcy

Whether the vendor is currently declared bankrupt or has filed for bankruptcy or has bankruptcy proceedings against them.

Encroachments

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

Water charges

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

Other notices

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

Chattels, etc

Whether there are any defects, faults or problems with any chattels being sold with the property. The intention of requiring such disclosure is to alert purchasers to potentially important and costly problems, for example a faulty heat pump. While more minor defects would also be required to be disclosed, the difficulty in drawing the line between major and minor defects makes it preferable to require that all defects be disclosed. In any case, minor defects are unlikely to influence the price of a property or a potential purchaser's decision to buy. Concern that purchasers could find any minor and unmentioned defect with a chattel and use it as an excuse to rescind the contract are unfounded for two reasons. First, the defect would have to be one which the vendor was aware of or ought reasonably to have been aware of. And secondly, the rescission would only be possible

¹⁰² A person can apply for a certificate stating that the property is not entered in the Heritage register under s 79 of the *Historic Cultural Heritage Act 1995*. This information is important to prospective purchasers as entry on the Heritage Register affects the right to carry out works on the property: *Historic Cultural Heritage Act 1995*, Part 6.

¹⁰³ As maintained by the Australian Heritage Council under the *Australian Heritage Council Act 2003* (C'th).

¹⁰⁴ Both established by the *Environment Protection and Biodiversity Conservation Act 1999* (C'th).

¹⁰⁵ this information is currently given in the s 337 Certificate.

¹⁰⁶ this information is available by requesting a Wayleave Search of Transend Networks for a fee of \$22.40; such easements may also be registered on the certificate of title.

if the failure to mention the defect amounted to a 'material' error (see discussion of *required conditions* below).

Strata or Community Lot

Whether the property is part of a strata scheme, and if so notification that more information in relation to the strata scheme is available in the 'strata title documents' and 'strata title statement' which are included within the 'disclosure documents' of which this vendor statement forms part (see discussion of strata title properties below).

In relation to some of these matters Mr Robert Menzie, a lawyer who responded to the issues paper,¹⁰⁷ commented:

...some effort should be made to have some additional matters included on property titles so that the obligation is on the authority asserting the rights to record details of those alleged rights. This should remove from a vendor the obligation to give advice and would give certainty to purchasers. I particularly refer to issues under the Historic Cultural Heritage Act, the National Estate or the Natural Heritage List and whether Transend Networks Pty Ltd has any easements over property. It is my view that these matters ought be able to be recorded appropriately on property titles and that each vendor and/or purchaser should be able to rely on the information on the title rather than having to do a separate search.

The Institute agrees with this view, and accordingly recommends that that rights asserted by authorities must be recorded on certificates of title. The Land Titles Office has indicated to the Institute that this process is already being undertaken in relation to some authorities. When the administrative process of entering all such rights on titles is completed these matters should be removed from the vendor statement.

Strata title properties

- **if the property is part of a strata scheme:**
 - a 'strata title statement'; and
 - specified strata title documents

In response to the Issues Paper the Recorder of Titles suggested that more detailed information should be disclosed in relation to strata titles:¹⁰⁸

The main aspect of the paper which concerns my office is vendor disclosure of strata title. My office receives numerous phone calls daily asking for an explanation of "strata title" as people were not aware of what they were purchasing at the time.

Further, under the *Strata Titles Act 1998* I am the adjudicator of strata disputes. Often parties to strata disputes only learn that their property is part of a strata scheme when a dispute arises with their neighbour, sometimes years after the purchase.

Purchasers need to be aware they are buying into a strata scheme and it can directly affect their use and enjoyment of the property. For example, elderly persons often wish to take their pet with them. Strata by-laws in many cases disallow the keeping of pets. In fact, Model By-laws in the *Strata Titles Act 1998*, which become operational when a strata scheme does not write its own, disallows pets without the prior written consent of the body corporate.

I would therefore suggest that vendor disclosure in respect to strata schemes needs to include:

- a) a statement that the property is part of a strata scheme and use of the property is subject to body corporate by-laws and requirements of the *Strata Titles Act 1998*;
- b) the name of the strata scheme;
- c) the name and contact details of the secretary of the body corporate or manager, or if no such person exists a statement disclosing the same;
- d) copy of the body corporate by-laws including a copy of the Model by-laws if applicable;

¹⁰⁷ Written correspondence, 12/7/04.

¹⁰⁸ Written correspondence, 12/7/04.

- e) a certificate under section 83(5) of the *Strata Titles Act 1998*;
- f) copies of insurance policies taken out by the body corporate including certificates of currency;
- g) a statement of any expenditure or liability the body corporate has incurred or resolved to incur and the liability of the lot owner or a nil statement of applicable; and
- h) details of the body corporate sinking fund or a statement that no such fund exists.

The Institute proposed in the Issues Paper that the vendor statement indicate:

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

Upon consideration of the Recorder of Titles' response it is agreed that more detailed information should be disclosed. Information relating to strata schemes can clearly be important to potential purchasers and is much more easily obtained by the vendor than by potential purchasers. It is therefore recommended not only that the vendor statement should indicate to potential purchasers that the property is part of a strata scheme, but also that the disclosure documents include a strata title statement and specified strata title documents.

strata title statement

It is recommended that regulations require that the strata title statement inform purchasers:

- that the property is part of a strata scheme and use of the property is subject to body corporate by-laws (which are included within the disclosure documents) and requirements of the *Strata Titles Act 1998*;
- information about the strata scheme: the name of the strata scheme and the name and contact details of the secretary of the body corporate or manager, or a statement that no such person exists;
- details¹⁰⁹ of all body corporate funds to which owners contribute (including the administrative fund,¹¹⁰ and, where in existence, the contributions fund,¹¹¹ and the sinking fund¹¹²);
- details of any expenditure or liability the body corporate has incurred or resolved to incur and the liability of the lot owner.
- details of any arrears in the contributions payable in relation to the unit/lot.

specified strata title documents

It is recommended that regulations require that the strata title documents include:

- a copy of the body corporate by-laws, or if none exist, a copy of the Model by-laws;¹¹³
- copies of insurance policies taken out by the body corporate including proof of currency.

Keeping the information current and accurate

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

¹⁰⁹ the details that should be required are those that must be provided in a certificate provided under section 83(5) of the *Strata Titles Act 1998*, i.e.:

- (a) the amount of any contribution payable by the owner; and
- (b) the due date for payment of the contribution; and
- (c) any amount by way of unpaid contribution that remains outstanding; and
- (d) the amount of any other liability to the body corporate that remains outstanding from the owner.

¹¹⁰ *Strata Titles Act 1998*, s 82.

¹¹¹ *Strata Titles Act 1998*, s 83.

¹¹² Sinking funds are not referred to in the *Strata Titles Act 1998*, however the Land Titles Office is of the opinion that they may be, and are, still used by body corporates (written correspondence, 23/8/04).

¹¹³ *Strata Titles Act 1998*, Schedule 1.

It is also recommended that the vendor statement contain a declaration that the information provided in it is accurate, and that the vendor is not aware of any inaccuracies in the other disclosure documents, or in the records on which those documents were based.

Exceptions

In the Issues Paper it was proposed that a vendor statement should not be required if the property is being sold

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

Only one respondent to the Issues Paper commented on this point. Mr Robert Menzie was of the view that there should be no such exceptions.¹¹⁴ Upon further reflection the Institute agrees in regards to the first and second categories. Vendors will only be required to disclose on the vendor statement matters of which they are aware or reasonably ought to be aware. While mortgagees and official trustees or receivers, may be able to provide little information on the vendor statement, if they are aware of matters which would normally be disclosed in the vendor statement then there is no apparent reason why they should not be disclosed. It is therefore recommended that where the vendor is a mortgagee or official trustee or receiver, this should be clearly stated on the vendor statement so that the purchaser is put on notice that the vendor statement is likely to reveal less detailed information about the property than might normally be expected. It is recommended that the only instance in which a vendor statement should not be required is where the Court Registrar is required by court order to sign the transfer documents.

Required conditions

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

Purchasers should be protected by the inclusion of ‘required conditions’ in all contracts for the sale of residential property.¹¹⁵ The following should be required conditions:¹¹⁶

- (a) except as disclosed in the disclosure documents –
 - (i) the property is sold free of encumbrances other than the encumbrances shown on the certificate of title; and
 - (ii) the buyer is entitled to vacant possession;
- (b) if, before completion of the contract, the buyer becomes aware of a breach of a condition mentioned in paragraph (a), the buyer may –
 - (i) rescind the contract; or
 - (ii) complete the contract and claim damages;
- (c) except as disclosed in the disclosure documents, there are no unapproved structures¹¹⁷ on the property;
- (d) if, before completion of the contract, the buyer becomes aware of any unapproved structure that is not disclosed in the disclosure documents, the buyer may rescind the contract;
- (e) the seller warrants that the seller will, at the time of completion, be able to complete the contract;
- (g) if, before the completion of the contract, the buyer becomes aware of an error in the disclosure documents, the buyer may –

¹¹⁴ Written correspondence, 12/7/04.

¹¹⁵ This approach is based on the ACT legislation. Similarly, the NSW legislation imposes implied warranties. The ACT approach is preferred because actually including the terms in the contract makes it more likely that purchasers will be aware of them, thus better fulfilling the aims of vendor disclosure.

¹¹⁶ these are a modified version of the conditions required by the *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 11, which is reproduced in Appendix A.

¹¹⁷ the term ‘unapproved structure’ should be defined to mean a structure for which the legally required authorisations, consents and approvals have not been obtained.

- (i) if the error is material – rescind the contract and claim damages, or complete the contract and claim damages; or
 - (ii) if the error is not material – complete the contract and claim damages;
- (h) the disclosure documents mentioned in this section form part of the contract.

Remedies

4. specified remedies should be available to the purchaser.

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

It is recommended that the legislation provide that only *liquidated* damages may be claimed for breaches of the legislation or for a loss arising as a result of an error in the disclosure documents or a failure to make the disclosure documents available or to include the required conditions in the contract of sale.

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

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

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

It is also recommended that the legislation provide that real estate agents have a duty:

- to inform the vendor of the disclosure requirements;
- to make the disclosure documents available for inspection; and
- to inform potential buyers that the disclosure documents are available for inspection;

and that where the breach of any of these duties results in a loss to the buyer, the buyer may claim liquidated damages (only) against the vendor's agent.

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

It is also recommended that the legislation state that the remedies provided for in the legislation and in the required conditions do not affect any other claim or action that may be available to any party under the current law (for example a claim for breach of contract or misrepresentation).

It should be noted that the Institute recommends only that *buyers* have the right to rescind the contract. The CAFT discussion paper¹¹⁸ asked 'Should the vendor have an option to rescind the contract rather than pay damages?' The Institute would answer no as such an option would mean that there would be little incentive for vendors to ensure to accuracy of the disclosure documents – for example if damages were claimed against a vendor as a result of an inaccurate disclosure document he or she could simply rescind the contract, avoid the damages, fix the documents and find a new buyer (this may be particularly advantageous in a rising market).

Criminal offences

It is recommended that non-compliance with disclosure requirements should not constitute a criminal offence. The provision of (or lack of) information relevant to the sale of private property is not an appropriate area for the criminal law to be involved. Where conduct is of a sufficiently serious nature, existing criminal offences

¹¹⁸ Office of Consumer Affairs and Fair Trading 'Pre Contractual Disclosure and Cooling Off Periods for Real Estate Sales' Discussion Paper, July 2004.

(such as fraud or obtaining a financial advantage by deception) can be charged. This issue can be reconsidered at a later stage if it is felt that serious harm warranting the protection of the state is resulting from non-compliance, or if stronger methods of ensuring compliance appear warranted.

How will vendor disclosure operate in practice?

Vendor disclosure will mean that purchasers are much better informed when they are considering buying property and negotiating the purchase price of a property. Vendor disclosure will also result in more open property dealings, which will be better documented. All of these factors should operate to reduce the number of disputes in this area, and so promote market efficiency.

Purchasers (and their solicitor or conveyancer) will be able to inspect the disclosure documents before signing the contract. Solicitors¹¹⁹ will continue to service and advise sellers (in obtaining and preparing the disclosure documents) and buyers (in interpreting the disclosure documents¹²⁰) and performing the other tasks of conveyancing (such as advising on insurance, signing and exchanging contracts, preparing documents to convey title, making rates and land tax adjustments, arranging for payment of settlement funds, and so on). Furthermore, people will continue to be able to carry out their own conveyancing if they chose to do so (the conveyancing system will certainly be no more complex).

While real estate agents may assist some vendors obtaining and preparing the disclosure documents, they will not be able to charge for this service unless they are solicitors or registered conveyancers.¹²¹ Some concern was expressed by the Real Estate Institute¹²² that the vendor disclosure requirements could result in civil claims being made against real estate agents. While this is true, that would only be the case where they failed in their duties in some way. As discussed above, the legislation would impose some duties on real estate agents, namely:

- to inform the vendor of the disclosure requirements;
- to make the disclosure documents available for inspection; and
- to inform potential buyers that the disclosure documents are available for inspection;

and where the breach of any of these duties results in a loss to the buyer, the buyer could claim liquidated damages (only) against the vendor's agent. Apart from this recommendation, the Institute does not recommend that the current tort or contract liability of agents be changed. It would be advisable for the Real Estate Institute to seek legal advice as to:

- the potential liability of agents in offering guidance, advice or assistance to vendors with the process of preparing the disclosure documents;
- the extent of the obligation on agents to ensure/check the accuracy/completeness of the disclosure documents;
- the potential liability of agents to purchasers where the disclosure documents are found to be in error; and
- whether any such liability can be avoided or minimised by the giving of warnings to vendors and/or purchasers.

The Real Estate Institute may then advise their members accordingly.

¹¹⁹ and perhaps soon conveyancers: it is currently an offence for any person other than a solicitor to carry out conveyancing work for a fee: *Legal Profession Act 1993*, s 54(1)(f), however the Conveyancing Bill 2004, which is currently before Parliament, will allow licensed conveyancers to carry on business as a conveyancer for a fee or reward.

¹²⁰ While it may no longer be necessary to carry out any further searches or make requisitions it was suggested that cautious vendors/solicitors may often still chose to do so, particularly in relation to s 337 certificates (telephone conversation, Phillip Kimber, 31/8/04). This will result in reduced savings to those purchasers, however as vendor disclosure is not recommended as a cost saving measure, this is seen by the Institute to be acceptable (presumably such cautious vendors/solicitors would also be most welcoming of vendor disclosure legislation).

¹²¹ It is currently an offence for any person other than a solicitor to carry out conveyancing work for a fee: *Legal Profession Act 1993*, s 54(1)(f), however the Conveyancing Bill 2004, which is currently before Parliament, will allow licensed conveyancers to carry on business as a conveyancer for a fee or reward.

¹²² Telephone conversation, Martin Harris (Real Estate Institute), 12/8/04.

Appendix A

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

Local Government Issues:

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

Specific Issues that may be raised in other legislation

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

Building Issues

11. In relation to his property, have you received any notices or orders from the Council or other statutory or government body concerning;
 - a) Building demolition or 'subject to prescribed conditions';
 - b) Illegal Works;
 - c) Uncover, open up work, demolition or inspection;
 - d) Rectification, or notice to repair an unhealthy building;
 - e) Any other council notice or order that affects any buildings or use of any building on the land? If yes, please provide details.
12. Has any building been erected or has any building work been performed on the land, for which building approval has been provided by the Council but for which a certificate of occupancy/completion has not been issued?
13. Is there any building on the land that has a housing indemnity policy in force? If yes, please provide details.
14. Since you purchased the property has there been any building work performed where a certificate of material compliance has been issued? If yes, have you received any council certificates with the endorsement "This building was not the subject of the normal application, permit and inspection procedures" [or such other endorsements as is appropriate for each jurisdiction]?

General

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

Encroachments

16. Are all structures and improvements on the property wholly within the property boundaries? If no, please give details.
17. Are you aware of any structures or improvements on any adjoining properties that partially or wholly encroach on your property boundaries? If yes, please give details.

Private/Commercial Easements

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

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

Encumbrances

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

Strata or Community Lot

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

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

GST Information

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

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

Appendix B

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

Section 11 Certain conditions to be included in contract

- (1) (a) except as disclosed in the contract –
 - (i) the property is sold free of encumbrances other than the encumbrances shown on the certificate of title; and
 - (ii) the buyer is entitled to vacant possession;
 - (b) if, before completion of the contract, the buyer becomes aware of a breach of a condition mentioned in paragraph (a), the buyer may –
 - (i) rescind the contract; or
 - (ii) complete the contract and claim damages;
 - (c) except as disclosed in the contract, there are no unapproved structures;
 - (d) if, before completion of the contract, the buyer becomes aware of any unapproved structure that is not disclosed in this contract, the buyer may rescind the contract;
 - (e) the buyer may not make any requisitions on the title to the property;
 - (f) the seller warrants that, at the date the contract is made –
 - (i) the seller will, at the time of completion, be able to complete the contract; and
 - (ii) the seller has no knowledge of any unsatisfied judgments, orders or writs affecting the property; and
 - (iii) there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property;
 - (g) the seller warrants that, at the date the contract is completed –
 - (i) the seller will be the registered proprietor of the lease (if any); and
 - (ii) there are no unsatisfied judgments, orders or writs affecting the property; and
 - (iii) there are no current or threatened claims, notices or proceedings that may lead to a judgment, order or writ affecting the property;
 - (h) if, before the completion of the contract, the buyer becomes aware of an error in the description of the property, the buyer may –
 - (i) if the error is material – rescind the contract, or complete the contract and claim damages; and
 - (ii) if the error is not material – complete the contract and claim damages;
 - (i) the disclosure documents mentioned in section 9 (1)(a) to (g) for the sale form part of the contract.
- (2) However, the conditions mentioned in subsections (f) (ii) and (iii) and (g) (ii) and (iii) are not required to be included in a contract if the property is being sold –

- (a) by a mortgagee in possession of the property; or
 - (b) by a registered or official trustee, or the official receiver, under the *Bankruptcy Act 1966 (Cth)*;
or
 - (c) under a court order.
- (3) If a contract for the sale of residential property is entered into and the contract does not include a condition required under subsection (1) to be included in the contract, the condition is taken to be included in the contract.

Note that section 3 provides –

unapproved structure means a structure –

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

Section 19 Compensation to buyer for false report etc

- (1) This section applies if—
- (a) a person buys residential property under a contract; and
 - (b) a statement or report mentioned in section 9 (1) (h) (ii), (iii) or (iv) is made available to the buyer; and
 - (c) the report is false or misleading in a material particular or is otherwise prepared without the exercise of reasonable skill and care; and
 - (d) because of that, the buyer incurs loss or expense.
- (2) The person who prepared the report is liable to compensate the buyer for the loss or expense.